

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 196

THE WESTERN UNION TELEGRAPH COMPANY,
APPELLANT.

vs.
THE CITY OF RICHMOND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA.

FILED JANUARY 20, 1892.

(11983)

(21,988.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 419.

THE WESTERN UNION TELEGRAPH COMPANY,
APPELLANT,

vs.

THE CITY OF RICHMOND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA.

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TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF VIRGINIA, } ss:

At a Circuit Court of the United States for the Eastern District of Virginia, begun and held at the court-room in the Custom-House, in the City of Richmond, on the first Monday of April, being the fourth day of the same month, in the year of our Lord, one thousand nine hundred and four.

Present: The Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

The Western Union Telegraph Company,	} In Equity.
Complainant.	
<i>versus</i>	
City of Richmond, Defendant.	



In the Circuit Court of the United States

For the Eastern District of Virginia.

THE WESTERN UNION TELEGRAPH COMPANY,

Complainant,

against

CITY OF RICHMOND, Defendant.

BILL IN EQUITY.

TO THE HONORABLE, THE JUDGES OF THE CIRCUIT COURT OF
THE UNITED STATES FOR THE EASTERN DISTRICT OF VIR-
GINIA:

The Western Union Telegraph Company, a corporation duly organized and existing under the laws of the State of New York, and a citizen and resident of said State, having its principal place of business in the State of New York and in the Southern District thereof, brings this, its bill of complaint, against the City of Richmond, a municipal corporation incorporated and existing under the laws of the State of Virginia, and a citizen of the State of Virginia, having its place of residence and its principal office and chief place of business within the territorial limits of Henrico County in the State of Virginia, and in the Eastern District of Virginia, and says:

1. **That this case is one wholly arising between citizens of different states, and that the subject matter thereof and the amount in controversy is of the value of more than two thousand dollars, exclusive of interest and costs, and is, also, one**

arising under the Constitution and laws of the United States, in that your orator, the Western Union Telegraph Company, asserts rights and privileges under Acts of Congress and the Constitution and Laws of the United States against the above named defendant.

2. That your orator, the Western Union Telegraph Company, is a telegraph company and a corporation duly organized and existing under an act of the legislature of the State of New York entitled "An Act to provide for the incorporating and regulation of telegraph companies," passed on the 12th day of April, 1848.

3. That the defendant, the City of Richmond, is a municipal corporation, incorporated and existing under the laws of the State of Virginia, and a citizen and resident of the State of Virginia, having its principal office and place of business within the territorial limits of the County of Henrico in the State of Virginia, and in the Eastern District of Virginia.

4. That your orator was thus organized as a telegraph company in the year 1851, and immediately thereafter began the work of construction and operation of telegraph lines in the State of New York and other states, and has continuously, since that time, been engaged in the work of constructing and operating telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired a continuous system of telegraph lines which now extend through all the states and territories of the United States, and into portions of the Dominion of Canada, and connects with telegraph lines in the Republic of Mexico and through the said land-lines of Mexico with the telegraph lines of the Central and South American Republics, and by means of submarine cables with the telegraph system of foreign countries; that at the present time its said system of telegraph lines operated and controlled by it, as aforesaid, comprises over 192,000 miles of poles and cables, and over 900,000 miles of wire; that upon the said system of

telegraph lines your orator has over 23,000 offices, and transmits yearly about 65,000,000 messages for the public and for the Government of the United States, and for the governments of foreign countries, exclusive of messages transmitted upon railway business, exclusive of office messages for your orator, and exclusive also of messages forwarded by private parties leasing wires from your orator; that said system of lines has been built up so as to connect with and be largely operated from the central office of your orator, which is situated in the City of New York, and the said lines radiate therefrom to all the important cities and commercial centers and to many thousand towns and villages in the United States and in North America and through the ocean cables and land lines above described to all the important commercial centres of this continent and the continent of Europe, and through lines there situated with the telegraph lines in all parts of the world; that among the lines of telegraph forming an important part of said system of your orator, and connected with its main office, as aforesaid, in the City of New York, and connecting with other lines of its telegraph leading to the important commercial centres of the South, Southwest, and elsewhere, are your orator's lines of telegraph constructed, maintained, and operated over and along the streets and alleys of the said City of Richmond, including its lines on Broad Street from the western side of Adam Street to the eastern side of Eleventh Street; on Bank Street from the western side of Ninth Street to the eastern side of Twelfth Street; on Main and Cary Streets from the western side of Seventh Street to the eastern side of Fourteenth Street; on Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Streets from the northern side of Broad Street to the southern side of Cary Street, and all of its lines covered by Chapter 88 of the Richmond City Code of 1899, and amendments thereto.

5. Your orator further represents that by an act of Congress of the United States approved July 24th, 1866, entitled, "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes," the provisions of which are substantially preserved in sections 5263 to 5268 inclusive, Title LXV of the Revised Statutes of the United States, it was provided as follows:

"Sec. 1. That any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States: Provided, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"Sec 2. That Telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other

business, and shall be sent at rates to be annually fixed by the Postmaster-General."

"Sec. 3. That the rights and privileges hereby granted shall not be transferred by any company acting under this Act to any other corporation, association or person: Provided, however, That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected."

"Sec. 4. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this act." 14 Stat. 221, c. 230.

Subsequently, by an act approved June 8, 1872, all the waters of the United States during the time the mail was carried thereon; all railways and all parts of railways which were then or might thereafter be put in operation; all canals and all plank roads; and all letter carrier routes established in any city or town for the collection and delivery of mail matter by carriers, were declared by Congress to be "post roads." 17 Stat. 308, c. 335. These provisions are substantially preserved in section 3964 of the Revised Statutes of the United States.

By an act approved March 1, 1884, "all public roads and highways, while kept up and maintained as such," were declared to be "post routes." 23 Stat. 3, c. 9.

Your orator further says that, complying with the provisions of said Act of Congress, it did, on or about the 8th day

of June, 1867, duly file its written acceptance with the Postmaster-General of the United States of the restrictions and obligations of said Act, and thereupon your orator became entitled to all the rights and privileges conferred by said Act and burdened with all the obligations imposed thereby, and it has continuously, since the filing of its said written acceptance, as aforesaid, fully performed, and at the present time is fully performing, all the obligations and requirements of said Act, and has carried upon its lines of telegraph (including its lines in said City of Richmond) messages for the Government of the United States and for the several departments thereof, giving the said messages priority over all other business and at rates annually fixed by the Postmaster-General, which rates are much less than the ordinary reasonable rates charged to and paid by individuals and the public for the transmission of like messages and communications.

6. Your orator further says that, by an act of Congress approved June 10th, 1872, entitled "An Act making appropriations for sundry civil expenses of the Government, for the fiscal year ending June 30th, 1873, and for other purposes," the following was among other things enacted:

"Provided that the Secretary of War be and he hereby is authorized and required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports, and signals as may be found necessary for the benefit of agricultural and commercial interests; and provided that no part of this appropriation, nor of any appropriation for the several departments of the government shall be paid to any telegraph company which shall neglect or refuse to transmit telegraphic communications between said departments, their officers, agents, or employes, under the provisions of the second section of Chapter 230 of the statutes of the United States for the

year 1866, and at rates of compensation therefor to be established by the Postmaster-General; provided also that, whenever any telegraphic company shall have filed its written acceptance with the Postmaster-General of the restrictions and obligations required by the Act approved July 24th, 1866, entitled 'An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes,' if such company, its agents or employes shall hereafter refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act or by the joint resolution approved on the 9th day of February, 1870, 'to authorize the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent and for giving notice on the northern lakes and seaboard of the approach and force of storms,' such telegraph company shall forfeit and pay to the United States not less than one hundred and not exceeding one thousand dollars for each refusal or neglect aforesaid, to be recovered by an action or actions at law in any District Court of the United States."

Your orator avers that, in compliance with the said last named Act, it has carried for the Government of the United States over its lines situated over and along streets and alleys of the City of Richmond, mentioned in said chapter 88 of the Richmond City Code of 1899, and especially streets and alleys mentioned in the ordinance of the City of Richmond entitled "An ordinance to amend and re-ordain section 27 of chapter 88, Richmond City Code (1899) requiring Telegraph, Telephone and Electric Light and Power Wires and Cables to be placed underground on certain streets of the city" approved March 15, 1902, and upon its other telegraph lines connected therewith at all times since the passage of said Act, at rates far below the reasonable rates charged to and paid by individuals

or by the public for similar services, communications relating to the meteorological and signal service from the various stations maintained by the Government of the United States throughout the interior of the continent, and along the seaboard, such communications being especially difficult of transmission from the fact that they are for the most part written in cipher, for the purpose of saving expense to the Government of the United States, and many words are indicated by a single arbitrary word or character; but that; nevertheless, even at the reduced rates at which your orator carries such communications, the charges amount to many thousands of dollars annually.

7. Your orator further represents that said Acts of Congress apply to all streets and alleys within the defendant, the City of Richmond, and that all streets and alleys within the defendant, the City of Richmond, are post roads under Acts of Congress and the Revised Statutes and the Constitution of the United States; and that your orator, the Western Union Telegraph Company having duly filed its written acceptance with the Postmaster-General of the restrictions and obligations of the said Act of Congress of July 24th, 1866, and having fully complied with all the restrictions, obligations, duties, and requirements of said Acts of Congress above mentioned, has the right to construct, maintain, and operate lines of telegraph over and along all streets and alleys within the defendant, the City of Richmond, in such manner as not to interfere with the ordinary travel thereon.

That the said grant by the United States in and by the aforesaid Acts of Congress of the right to construct, operate, and maintain its lines of telegraph upon all streets and alleys of the City of Richmond was a grant made upon a full, valuable, and continuing consideration paid and rendered by your orator to the United States, which consideration was an agree-

ment of your orator evidenced by your orator's written acceptance of the Act of Congress of July 24th, 1866, duly filed with the Postmaster-General, of the restrictions and obligations of the said Act, as hereinbefore set forth, and the full and continuous performance by your orator of all ~~the~~ obligations and duties created and imposed by said Acts of Congress. That your orator has since said acceptance of said Act performed all the obligations and duties required by said Acts and by law, and your orator has ever since the date of filing of said acceptance given, and is still giving to the United States, and to the several departments of the Government, and their officers, priority over all other business in the transmission of telegrams on the lines of your orator, situated over and along the streets and alleys of the defendant, the City of Richmond, at rates annually fixed by the Postmaster-General, which rates are far less than the rates charged, paid and received by your orator for the same kind of services from the public, and greatly less than the reasonable value of the said services rendered by your orator to the Government. Your orator has accepted, among others, the provisions of the said Act of Congress of July 24th, 1866, giving to the United States the right to purchase all of its telegraph lines and effects at an appraised value to be ascertained by five competent disinterested persons as provided by the said Act of Congress. Your orator states that by reason of the premises, its acceptance of the said Act of Congress, the construction and maintenance of its telegraph lines thereunder, and the continued performance by your orator of the requirements of the said Acts of Congress, the right granted by the said Act of July 24, 1866, to your orator to construct, maintain, and operate its lines of telegraph over and along the streets and alleys of the defendant, the City of Richmond, became vested, and the said grant is in full force and effect, and

your orator avers that its right to construct, maintain, and operate its said lines of telegraph over and along the streets and alleys of the defendant, the City of Richmond, is complete; and your orator further states that it has constructed, maintained, and operated, and is now maintaining and operating its lines of telegraph in the City of Richmond so as not to interfere with the ordinary travel on the streets and alleys of said city, and that your orator is, within the proviso of said Act of Congress of July 24th, 1866, and entitled to all the rights, powers, and privileges conferred by said Act.

8. Your orator further represents that the defendant has ordained and enacted an ordinance concerning wires, poles, conduits, etc., in, over, and under the streets in said city, carried into and published as Chapter LXXXVIII. of Richmond City Code, a copy of which is herewith filed marked "Exhibit No. 1 with Bill," and copies of amendments thereto are also herewith filed marked "Exhibits Nos. 2 and 3 with Bill," all of which are prayed to be treated as parts of this bill; that said ordinance and said amendments thereto are grossly unreasonable and illegal; that said ordinance and said amendments thereto are in gross violation of and repugnant to Article 1, section 8 of the Constitution of the United States, and Article XIV., Section 1, of amendments to the Constitution of the United States, and said Act of Congress approved July 24th, 1866, and said other Acts of Congress above mentioned; that said ordinance and said amendments thereto are in gross violation of your orator's rights and powers and privileges under the aforesaid provisions of the Constitution of the United States and amendments thereto, and the aforesaid enactments of the Congress, and impose unreasonable and illegal burdens and obstructions upon foreign and interstate commerce, upon the business of foreign and interstate commerce, conducted by your orator, and upon your orator, and deny to and deprive your

orator of its rights, powers, privileges and property guaranteed to your orator under said Constitution and Statutes of the United States.

Your orator respectfully submits, that said ordinance and each and every section thereof and all amendments thereto are unreasonable, unjust, illegal and void for the following, amongst other reasons: That the City of Richmond is at no appreciable expense in issuing the licenses under said ordinance, or in inspecting and supervising the poles, wires, and other appliances of your orator; that the charges imposed by said ordinance are not based upon any proper estimate of the costs and expenses of the defendant for the inspection and supervision of your orator's lines; that the charges imposed by said ordinance are enormously in excess of any amount that could be incident to the most careful, thorough, and efficient inspection and supervision of your orator's lines, poles, wires, cables, and other appliances, together with the cost of all reasonable measures and precautions that could properly be required to be taken by the defendant for the safety of its citizens and the public generally; that the poles, wires, cables, and appliances of your orator are so located, constructed, maintained and operated upon the streets and alleys of the defendant as not to interfere with their use for street and highway purposes, nor to interfere with any kind of traffic; that your orator's lines are not old nor decayed nor worn out, but, on the contrary, are comparatively new and sound, and that there is no danger of accident from the decay or breaking down of poles and wires and cables or other appliances of your orator, as your orator in its own interest keeps its lines in a state of good and sound repair; that all provisions of said ordinance and of every section thereof, and of all amendments to said ordinance requiring your orator to construct and maintain conduits and run its wires therein, and imposing charges upon

your orator's wires run in such conduits, and requiring the removal of your orator's poles, wires, cables and other appliances from streets and alleys in said City of Richmond are unreasonable and illegal and deny to and deprive your orator of its rights, powers, and privileges under the aforesaid provisions of the Constitution of the United States and the Acts of Congress pursuant thereto; that the charges imposed upon your orator by said ordinance are enormously more than could lawfully be imposed under any power existing in the defendant to make charges for legal purposes and lawfully impose taxes; that your orator is paying to the defendant the same *ad valorem* or property tax upon lines, poles, wires, cables, appliances and property in said City of Richmond which is imposed upon and paid by other corporations and citizens; and that in addition thereto your orator is paying to the defendant the large sum of \$500.00 per annum as a specific license tax; and your orator submits that said taxes so paid by your orator to the defendant aggregate the largest sum which could be properly and legally imposed upon your orator for all purposes; and that the fees, taxes and charges (whatever they may be called) imposed by said chapter 88 and amendments thereto and especially those annually imposed upon all poles of your orator (as set out in said ordinance and the amendment thereto) and upon each mile of its wires required by said ordinance and the amendments thereto be run in conduits, are unreasonable and illegal and null and void.

Your orator further submits that, by the general scheme of said chapter 88 and the amendments thereto, the construction and management of its telegraph lines, poles, wires, cables, and conduits, and the control of your orator's business is taken largely out of its own hands and is placed in the hands of the City Engineer of the City of Richmond and its Committee on Streets, *e. g.*

It is provided in section 1 of said chapter 88 that said city Engineer is to determine the size, quality, character number, location, condition and appearance of your orator's poles before they can be erected in said city, and he is also authorized at any time to order changes of location, etc. Your orator is advised that these powers of the City Engineer are absolute and final and that no provision is made to control or appeal from his decision, however unreasonable, however arbitrary, however burdensome and oppressive.

The second section of chapter 88 provides as follows :

"2. That all poles now erected in the streets or alleys of the City of Richmond, for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances to be removed and run in conduits, shall hereafter be allowed to remain only upon terms and conditions hereinafter set forth."

This section of said ordinance practically and substantially annuls said act of Congress approved July 24, 1866.

Under the provisions of section 4 of said ordinance, the committee on streets could require your orator to allow other persons or companies to put such wires upon its poles as will not, in the opinion of said committee unreasonably interfere with the business of the person owning such poles, and upon such terms and conditions as may be agreed upon between the parties interested. The committee is made absolute judge as to how much interference with the company's business is to be allowed. Some interference seems to be expected and intended and the only restriction imposed is that, *in the opinion of the committee*, this should not be unreasonable. This feature of said ordinance has no provision for an appeal to the courts, but on the contrary, your orator is advised that under a true construction of its provisions its meaning is that the committee shall be the sole arbiter and that its action in this matter, however unreasonable, however improper, shall be final.

Again, if the owner of poles and the company or person desiring to use its poles cannot agree on the terms and conditions on which the latter may use the poles of the former, each shall select an arbitrator who shall select the third arbitrator, and if there be a failure on the part of the owner for 30 days to select an arbitrator, then the City Engineer may select an arbitrator for such owner, and these two may select a third, and if there be a failure to select the third arbitrator, as aforesaid, which might easily be the case, then the City Engineer may select the third arbitrator, and if the three arbitrators selected, as aforesaid, fail to settle and determine said terms and conditions within thirty days from the date of the appointment of the third arbitrator, the City Engineer is given power to select a person who shall have power to settle and determine said terms and conditions.

Section 5 of said ordinance gives the City Engineer absolute and final power to determine the size, quality, character, number, location, condition, appearance and manner of erecting all poles with no provision for an appeal from his decision, however unreasonable, arbitrary or improper it may be.

Section 6 provides amongst other things that the City of Richmond shall have the right to run all wires needed for the fire alarm and police departments of the city on all poles erected or allowed under said ordinance to remain on any street or alley of said city and in such positions on said poles as shall seem proper to the superintendent of such departments. No compensation is to be made by the City of Richmond for this use of poles and no limit is fixed to the number of wires which may be so placed upon said poles by the City of Richmond. The wires of the city might under the provisions of this section be so numerous as to prevent the poles from carrying any other wires.

Section 8 gives the City Council the right to put at any time other restrictions and regulations as to the erection and use of poles, wires, and other apparatus connected with the transmission of electricity, and from time to time to require such poles as it may deem proper to be removed and the wires thereon to be run in conduits, "upon such terms as the city may deem proper." No provision is made to supervise or appeal from what the city deems proper in this respect.

And your orator is advised that by acceding to the provisions of chapter 88 and acting thereunder, it would surrender its rights under the Constitution and laws of the United States and submit itself to the mercy of the defendant.

Section 10 of said ordinance provides, amongst other things, that all persons and corporations shall annually pay to the Treasurer of the City of Richmond a fee of two dollars (\$2.00) for each and every telegraph pole used, possessed, or maintained by them in any of the parks, streets, lanes or alleys of the City of Richmond and your orator submits that this fee or tax is a gross violation of the rights and privileges of your orator under the aforesaid provisions of the Constitution of the United States and the amendments thereof and the aforesaid Acts of Congress, and is an unreasonable, unwarranted, and illegal burden upon your orator and its foreign and interstate commerce and is repugnant to the aforesaid constitutional and statutory provisions. Furthermore your orator submits that said fee and tax of two dollars per pole per annum is enormously more than could be properly or legally charged as a rental for the space occupied by said poles and lines, and enormously more than could be charged under any lawful form of taxation. But said pole tax is even worse and more enormous when it is remembered that each user of the same pole is required to pay a separate tax of \$2.00 per annum on each poles so used.

Section 13 of said ordinance provides, amongst other things, that any corporation using, possessing, or maintaining any telegraph poles in any of the streets, lanes or alleys of the City of Richmond who shall have failed by the 20th of January of each and every year to pay a fee of two dollars (\$2.00) on each pole shall be liable to a fine of not less than five nor more than one hundred dollars for each pole upon which it is in default, and that each day of default shall be a separate offence, and that such fines may be imposed by the Police Justice of the City of Richmond.

Section 25 of said chapter provides that each and every provision of said ordinance, unless otherwise provided, shall apply to any pole, wire, or other apparatus used in connection with the transmission of electricity hereafter erected in the streets or alleys, whether the same be erected by way of repairs or for additional routes, or for any other purpose.

Section 26 of said ordinance provides that any person violating any restriction, provision, or condition imposed by or failing to perform any requirement made under said chapter by the City Engineer, the Superintendent of Fire Alarm and Police Telegraph Department or Chief of the Fire Department, as to which there is not in said chapter a fine specifically imposed, shall be liable to a fine of not less than ten dollars nor more than five hundred dollars to be imposed by the Police Justice of said City, each day's violation or failure to be a separate offence.

Section 27 of said ordinance, as amended by an ordinance approved March 15, 1902, entitled "An ordinance to amend and reordain section 27 of Chapter 88, Richmond City Code (1899), requiring telegraph, telephone and electric light and power wires and cables to be placed under ground on certain streets of the city," provided as follows:

"1. That section 27 of Chapter 88, Richmond City Code (1899) be amended and reordained so as to read as follows:

"27. **The telegraph**, telephone and electric light and power overhead wires and cables (other than trolley wires) and all other overhead appliances for conducting electricity, and the poles therefor, heretofore and now being in any street, alley or public ground of the city, owned and maintained under any existing franchise, are hereby ordered to be removed from the following named streets—to-wit: On Broad Street from the western side of Adams Street to the east side of Eleventh Street; on Bank Street from the western side of Ninth Street to the eastern side of Twelfth Street; on Main and Cary Streets from western side of 7th Street to eastern side of Fourteenth street; on 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th Streets from the northern side of Broad Street to the southern side of Cary Street, within twelve months from the date of the approval of this ordinance, and any such wires hereafter installed under any existing franchise or under any franchise hereafter granted shall, within the limits of the above described district, unless otherwise provided by the City Council, be placed under ground within twelve months from the date of permission granted by the City Council. Any company, corporation, partnership or individual, owning or controlling any such overhead wires, cables or appliances, or poles, that refuses, neglects or fails to remove them from overhead within the time as hereinbefore provided, or which fails to place said wires, hereafter installed in the said underground district, underground as hereinbefore provided, shall be liable to a fine of not less than \$100 nor more than \$500 for each pole so remaining, to be imposed by the Police Justice of the City of Richmond; and for every week of continued failure and neglect to so remove them after the imposition of the fine above mentioned, such company, corporation, partnership or individual shall be liable to a fine of not less than \$100 nor more than \$500, to be imposed as above stated. And any overhead wires hereafter

installed within the said underground district shall be installed subject to the provisions of this ordinance.

"2. This ordinance shall be in force from its passage."

Your orator respectfully submits and insists that said 27th section of said ordinance is grossly unreasonable and illegal and in violation of the rights, powers and privileges guaranteed to your orator under the aforesaid provisions of the Constitution of the United States and the Acts of Congress and that said section is illegal and null and void. Your orator's lines of telegraph throughout the City of Richmond and upon its streets and alleys, including all of the streets and alleys of the district or territory covered by said section 27, have been constructed, maintained and operated and are now maintained and operated so as not to interfere with the ordinary travel on said streets and alleys of said city; that your orator is within the provisions of said Act of Congress of July 24, 1866, and entitled to all the rights, powers and privileges conferred by that act; that your orator's poles, wires, cables, lines and appliances do not obstruct or interfere with public travel or the ordinary use of the streets and alleys of said City of Richmond or any or either of them and that no proper or sufficient reason has existed or now exists for the enactment of said section 27 of said ordinance or the requirements therein contained; that these requirements are enforced under the enormous penalty or fine of not less than \$100.00 nor more than \$500.00 for each pole remaining in the district covered by said section 27 as set out in said Chapter 88, and the amendments thereto; and for every week of continued failure to remove said poles an additional fine of not less than \$100.00 nor more than \$500.00 is imposed.

By section 28 of said chapter 88, as amended and approved December 18, 1903, your orator is not only compelled to go underground with its wires in certain streets within what is

now denominated "the underground territory" of the city, but it is required to build at its own expense, conduits, not of a character satisfactory to itself and adequate to its purposes; but, on the contrary, your orator is required to build conduits of location, plan, size, construction and material satisfactory to the Committee on Streets and Shockoe Creek and the City Engineer. Not only so, but it is further required by said section 28, not only that such conduits to be built by your orator shall be of sufficient capacity to accommodate its own wires and business, but the wires of the city must be carried therein free of charge and at least one duct must be reserved for such wires.

Furthermore, it is provided in said amended section 28, that such conduits to be built by your orator shall be of sufficient capacity to accommodate the wires in the streets and alleys of the underground territory where built; and not only so, but such conduits shall provide for the increase of such wires in such streets and alleys to the extent at least of 30 per cent.; and no matter what the necessities of your orator may be, such increase of space is not to be occupied by it, directly or indirectly, without the consent of said Committee on Streets and Shockoe Creek, while any other person or corporation—it may be the special rival and competitor of your orator—desiring to run wires therein, may after obtaining the consent of said committee occupy such portions of such conduits and upon such terms as may be agreed upon or determined by arbitration, as will appear from an inspection of sections 4 and 30 of said chapter 88, where the mode of such arbitration is set out; in the last analysis, substantially as determined by the City Engineer, who, by the sections last numbered, is not only authorized and empowered to fix the terms upon which your orator shall be compelled to receive, upon its poles outside the underground territory and into its conduits within said

territory, the intruding wires it may be of rivals and competitors. Furthermore the aforesaid committee is also authorized and empowered to require and compel your orator to furnish to the wires of other persons, it may be rival and unfriendly corporations, such protection or protections as the said committee may deem necessary or proper.

Not only does chapter 88 and the amendments thereto thus assume general control of your orator's business or property and subject it to the specially onerous, objectionable and destructive impositions just commented upon, but said chapter includes and involves another and distinct class of provisions and reservations. In section 8 of said chapter, to which attention has already been called, it is provided: "that the City Council hereby reserves the right to put at any time other restrictions and regulations as to the erection and use of said poles, wires and other apparatus used in connection with the transmission of electricity, and from time to time to require such poles as it may deem proper to be removed, and the wires thereon to be run in conduits upon such terms as the city may deem proper."

It will be observed that the reservations in section 8 are in all respects unlimited, nor is this the only section in the chapter in which such reservation is claimed, e. g., section 31 provides that no privilege as to building and owning conduits shall last longer than fifteen years, at the expiration of which time the city may put such other restrictions, conditions and charges as it may see fit and shall be lawful, or may order its removal at the expense of the owner, and section 32 provides that on and after January 1st, 1900, the City Council reserves the right to charge such larger compensation for the rest of the term of the privilege as it may see fit.

Section 30. It is not necessary, as your orator thinks, to set out in detail the mode of proceedings under section 30 with

regard to fixing the terms upon which other, and it may well be rival and competing companies or individuals, doing an electrical business, may demand and enforce entrance into and use of the conduits which your orator is required to build, and the protection for his wires which the person so entering said conduits may require your orator to furnish. Enough to say that these proceedings are very similar to those already set out in the discussion of the preceding sections of the ordinance more or less *in pari materia* with this, and are as unreasonable and radical as the worst of these proceedings, and enforced by like enormous, excessive and illegal penalties.

Sections 31 and 32 of Chapter 88, are as follows :

"31. No privilege as to the building and owning of said conduits shall last longer than fifteen years, at the expiration of which time the city may put such other restrictions, conditions and charges as it may see fit and shall be lawful, or may order its removal at the expense of the owner.

"32. For the privilege of using and occupying the streets of the city as herein proposed, each person or corporation owning or using any wire or wires run in such conduit shall, each year, until January 1, 1900, pay to the city treasurer a sum equal to \$2.00 per wire per mile so owned or used by said person or company. On or after January 1, 1900, the City Council reserves the right to charge such larger compensation for the rest of the term of the privilege as it may see fit. Each person or corporation shall, on the 15th day of June and January of each year, pay to the city auditor a sum equal to \$1.00 per mile per wire then owned or used by such person or corporation, and shall render to the auditor a sworn statement as to the number and length of each of the wires then owned or used by him or it. The Committee on Finance may, when it may see fit, have the books of the person or corporation rendering such statement examined by a bookkeeper employed by said committee to ascertain whether such statement is accurate.

For failure to allow such examination, whenever requested by the Finance Committee, the person or corporation owning any wires in such conduits shall be liable to a fine of not less than one hundred nor more than five hundred dollars for each wire of said person or company admitted or proven to be in such conduit; and for failure to pay such semi-annual compensation upon the days above specified, the person or company shall be liable to a fine of not less than ten nor more than five hundred dollars; each day's failure to be a separate offence."

Section 31 is one of the most strongly marked and objectionable sections of said ordinance, its only merit being that it utters no uncertain sound; that he who runs may read. He, who with section 31 before him, accepts the provisions of chapter 88 and builds his conduits under it, is distinctly warned that however favorable and satisfactory the privileges, provisions and conditions under which he does this may be, and however great the outlay he may make upon this basis, yet these rights and privileges cannot last longer than fifteen years, and at the expiration of that period the city may impose any other or further terms and demand any other or further charges however unreasonable or however unendurable, which "it may see fit," provided only they are "lawful"; or, at its option, the city may kick out the conduit builder altogether and require the removal of all his works and property at his own expense.

It is not believed that this honorable court will hold that this is a reasonable and valid enactment.

Your orator further submits that the tax imposed by said **section 32** is grossly unreasonable and excessive, and denies to your orator its rights and privileges under said act of Congress of July 24, 1866, and is grossly repugnant to that act and the aforesaid constitutional provisions. The said tax purports to be a tax "for the privilege of using and occupying the streets of the city." In the underground system it is manifest that the

conduits only—not the wires run within them—occupy some small space beneath the surface of the streets, and your orator submits that for such “occupancy” and all “occupancy” of streets and alleys connected therewith or incident thereto, the tax imposed by said ordinance is grossly unreasonable and excessive and grossly repugnant to said constitutional and statutory provisions. A tax of as much as two (\$2.00) dollars per mile upon each separate wire run in a conduit would in itself be grossly unreasonable and excessive, and would deprive your orator of its rights and privileges under said act of Congress of July 24, 1866, and would be repugnant thereto and to the aforesaid constitutional provisions, but the tax just mentioned by no means fairly states the tax imposed by said ordinance. By reference to said ordinance, it will be seen that it imposes, not a tax upon each conduit or upon each wire run in such conduit and imposed only upon the owner of such wire, but it is a tax of two dollars per wire per mile to be multiplied not only by the number of wires owned by each party, but by the number of parties who use each wire, so that if ten parties use the same wire, that wire would be made to pay a tax of twenty (\$20.00) dollars per mile and that “for the privilege of using and occupying the streets.”

Manifestly the conduit does the only “occupying” of space and it does no more “occupying” if there be 100 wires in such conduit than if there be only one wire therein. Much less should the tax be multiplied not only by the number of wires but also by the number of users of each wire, so that the identical conduit filled with wires does no more “occupying” than an empty conduit, and yet the owner of the conduit is made to pay say hundreds of times as much in one case as in the other.

Furthermore, said section 32 provides that: “On or after January 1, 1900, the City Council reserves the right to charge such larger compensation for the rest of the term of the privi-

lege as it may see fit." No limit whatever is fixed, and under this provision of said ordinance, taken in connection with other sections thereof, the City Council would have the absolute right to make any charge whatever that it might choose, however extravagant and enormous that charge might be.

Section 33 contains but one single and simple provision, but it is one which breaks down the only limitation to the operation of the ordinance in general or at least of the conduit features of it. These features apart from section 33 are confined to the circumscribed area specified in the amendment to section 27 already above quoted.

But section 33 does away with this limitation or protection and provides that the conduit system "*shall be extended from time to time, whenever required by the City Council, to cover streets or alleys upon which the Council may determine, from time to time, that no overhead wires shall be run.*" Thus your orator is placed at the absolute mercy of the said City Council.

9. Your orator is advised that by filing plans of proposed conduits under section 28, as amended, of said chapter 88, it would accede to all of the provisions of said chapter, including the reservations of sections 8, 31, 32 and 33 and all reservations of the city of Richmond or its Council of the right to impose new terms and conditions upon the privilege, if such it be, of placing its wires in conduits within the underground territory of the city of Richmond.

Your orator is further advised that by filing said plan, it would substantially make a contract with said city and would find itself in the future unable to object to any additional burdens that the city might choose hereafter to impose, whether with reference to fees, licenses, taxes, and charges, or to its poles, wires, cables, and other appliances, or to the continued use of its conduits, and that your orator might find itself compelled to remove such conduits at its own expense if unwilling to accede to any such newly imposed charges and burdens.

Not only so, but your orator is further informed, believes and charges, that by complying with the terms of chapter 88, in filing the plans and specifications required by section 28 of said chapter, your orator would rob itself of the protection of the act of July 24, 1866, and of the rights guaranteed to it thereunder, and would thus leave itself defenseless in the premises, and the peril of your orator and the enormity of the burdens to which it would be exposed by its acceptance of said ordinance is illustrated by another marked feature of chapter 88 and one which stamps it as unreasonable and null and void, namely, its exaggeratedly penal character. It is scarcely too much to say that it is impossible for any fair-minded man to read this chapter and observe this feature of it, without having the suggestion occur that the spirit and object of these penalties was something other than the enforcement of the ordinance. Without examining each separate infliction of penalty, it may suffice to say that there are thirteen penalties imposed by the chapter, and that they aggregate, that is a single imposition of each, from a minimum of \$505.00 to a maximum of \$4,450.00, but this statement gives a very inadequate idea of how abnormally developed this penal feature of the ordinance is. Almost every penalty connected with the management or removal of poles is to be multiplied by the number of poles involved, and almost every penalty imposed for default in time provides that each day's default shall be a separate offense, and, of course, visited with a separate penalty; and it is in several sections provided that each pole remaining and each day elapsing shall subject your orator to a separate imposition of the penalty; so that it is impossible to calculate what these penalties would amount to under a vigorous enforcement of said ordinance.

10. **The amendment to said section 28, approved December 18, 1903,** required your orator to remove all of its poles, wires, cables and other appliances for conducting electricity, from the streets and alleys of the defendant within the district men-

tioned in said section 27, as amended within six months from the approval of said amendment to section 28, and the time so fixed having expired and your orator not having complied with said requirements of the defendant, your orator has been threatened by the defendant, through its city attorney, and believes and charges that the defendant, through its city attorney intends to proceed against it forthwith for all penalties imposed subsequent to June 18, 1904, by said chapter 88 and the various sections thereof, and to insist upon the enforcement and recovery of said fines for each and every day of the failure of your orator to comply with the requirements of the defendant, and your orator charges and believes that it is the purpose of the defendant to use said penal features of said chapter 88 as a means for requiring and compelling the removal of your orator's poles, wires, cables and other appliances for conducting its aforesaid business from said underground territory described in said section 27 as amended.

11. Your orator further says that it is without adequate remedy save in a court of equity, and that it will be subjected to irreparable loss and injury unless this honorable court shall, by its writ of injunction, enjoin and restrain the defendant from enforcing the aforesaid ordinance and from enforcing the penal features thereof, and unless this honorable court shall declare and decree that said ordinance and the various sections thereof, and especially those hereinabove particularly enumerated, to be unreasonable and illegal and null and void.

12. Your orator further represents that it has paid to the defendant the license tax of \$500.00 imposed upon it for the current year, and also the pole tax of \$2.00 per pole imposed upon your orator by said ordinance for the current year, and also all *ad valorem* and property taxes which it is required to pay prior to this time.

13. Your orator further submits and insists that said ordinance, chapter 88, and each and every section thereof and all amendments thereto, and especially sections 1, 2, 4, 5, 6, 8, 10,

13, 25, 26, 27, 28, 30, 31, 32, and 33 thereof, and the amendments to said sections 27 and 28 are grossly unreasonable and illegal and repugnant to the aforesaid provisions of the Constitution of the United States, and the aforesaid acts of Congress, and should therefore be declared and decreed by this honorable court to be null and void.

14. Your orator further represents that this bill has been prepared with great haste, and that it desires and asks the privilege of preparing and filing amendments thereto more thoroughly and completely stating the unreasonable and illegal features of said ordinance and its various sections and provisions, and assigning other and further and additional reasons why said ordinance and each and every section thereof and all amendments to said ordinance should be declared by this honorable court to be null and void.

15. In tender consideration whereof, and because your ora-tor is otherwise remediless in the premises, he prays that the city of Richmond may be made a party defendant to this bill and required to answer the allegations thereof, but answer under oath is hereby expressly waived; the said city of Richmond, its attorneys, agents and servants, and all others acting by, through or under its authority, may be permanently and perpetually enjoined and restrained from enforcing, or attempting to enforce, against your orator the provisions and requirements of said chapter 88 of Richmond City Code, 1899, and from enforcing, or attempting to enforce, against your orator the provisions and requirements of any or either of the various sections of said chapter 88, and from enforcing, or attempting to enforce, against your orator the aforesaid amendments to sections 27 and 28 of said chapter 88, and from enforcing, or attempting to enforce, against your orator the provisions of any amendment to said chapter 88, and from enforcing, or attempting to enforce, against your orator the penal

features of said chapter 88, and amendments thereto, and from enforcing, or attempting to enforce, against your orator the fines and penalties, or any or either of them, imposed by said chapter 88, and amendments thereto, and from removing, or attempting to remove, from the streets and alleys of the defendant the poles, wires, cables, and other appliances of your orator, or any or either of them, and from, in any manner or to any extent, interfering with your orator or its property, and from, in any manner or to any extent, obstructing the business of your orator; that said chapter 88, and each and every section thereof, and all amendments thereto, and especially sections 1, 2, 4, 5, 6, 8, 10, 13, 25, 26, 27, 28, 30, 31, 32, and 33, and the amendments to said sections 27 and 28, may be declared and decreed to be wholly unreasonable and illegal and null and void, and that your orator may have such other and further and general and complete relief as the nature of its case may require and to equity may seem meet.

Your orator also prays that pending the hearing of the application for an injunction, and pending the granting of a permanent and perpetual injunction in the premises, the court may issue a temporary restraining order prohibiting each, all, and every of the proceedings, matters, and things as to which your orator hereinabove prays for a permanent and perpetual injunction, until the motion and application for an injunction can be heard and until a permanent and perpetual injunction shall be granted, as hereinabove prayed.

May it please your honors to grant unto your orators the writ of subpoena of the United States of America, to be directed to the defendant, the city of Richmond, commanding it by a certain day and under a certain penalty, to be and appear before your honors in this honorable court then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular the premises and to stand

and abide and perform such order and decree therein as to your honors shall seem agreeable to equity and good conscience.

THE WESTERN UNION TELEGRAPH COMPANY,

By A. L. HOLLADAY and

STILES, POWERS & STILES,

Its Counsel.

GEORGE H. FEARONS,

STILES, POWERS & STILES, and

A. L. HOLLADAY,

Solicitors and Counsel for the Complainant.

UNITED STATES OF AMERICA,

Eastern District of Virginia:

On this 21st day of June, 1904, before me, in the city of Norfolk, Virginia, personally appeared J. S. Calvert, assistant superintendent of the Western Union Telegraph Company, who made oath that he had read the foregoing bill of complaint, and knows the contents thereof; that the statements thereof so far as made, upon his own knowledge, are true, and that he believes the statements of said bill to be true so far as made and stated on information and belief.

J. S. CALVERT.

Given under my hand this 21st day of June, 1904.

(Signed) J. N. WHITTAKER,

Notary Public for City of Norfolk, Va.

My commission expires 6 January, 1906.

Exhibit No. 1, with Complainant's Bill.**CHAPTER LXXXVIII.**

Concerning wires, poles, conduits, etc., in, over and under the streets.

1. Hereafter no pole shall be erected, nor any wire or other apparatus, used in connection with the transmission of electricity, be placed in position, in any street or alley of this city, until the City Engineer shall have first determined upon the size, quality, character, number, location, condition, appearance, and manner of erection, of such poles, wires, or other apparatus. Whenever at any time the said poles, wires, or other apparatus, shall, in the opinion of the City Engineer, need changing in size or location, replacing, repairing, being made safe and secure, or being put in proper and suitable condition and appearance, such one of the persons, so using the same (if there be more than one, as shall be selected by the City Engineer) shall immediately proceed to do such changing as to size and location, replacing, repairing, making safe and secure, or putting in proper and suitable condition and appearance, as the said engineer shall designate in writing, and all damage done to any street, by the erection of any pole, shall, from time to time, be rectified and repaired, as required by the City Engineer. All expenses arising from any materials furnished or work done under this section, shall be borne in such proportion by all persons using such poles, wires or other apparatus as the City Engineer may deem fair; unless the parties can agree upon satisfactory terms within ten days from the time such changes or repairs shall have been completed.

2. That all poles now erected in the streets or alleys of the city of Richmond for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances to be removed and

run in conduits, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth.

3. No pole now erected for the support of telephone wires shall remain on any street in said city after the 15th (fifteenth) day of December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes, in accordance with the provisions of this ordinance, and such other conditions as the Council may see fit to impose. And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such pole or poles and telephone wires supported thereon, from the streets or alleys of the city, by the twentieth day of December, 1895, and restore the street to a condition similar to the rest of the street, or alley contiguous thereto, the said owner shall be liable to a fine of not less than five, nor more than one hundred dollars, for every such pole so remaining in the street or alley, to be imposed by the Police Justice of the city; each day's failure to be a separate offense.

4. The Committee on Streets may hereafter require any person or company owning any such poles, used for telephone or telegraph purposes, to allow any other person or company to place upon its pole and in such positions thereon any telegraph, telephone, or any other light current wire which may be used for the transmission of electricity, now belonging to, or that may hereafter belong to, any person or company authorized by the Council to run wires in the streets or alleys, as the committee may from time to time deem proper, and which will not, in the opinion of said committee, unreasonably interfere with the business of the person or company owning such poles, and upon such terms and conditions as may be agreed upon by said owner and any person or company desiring to use such poles; and in the event that said owner and the person or company desiring to use said poles cannot agree upon satisfactory terms and conditions, the same

shall be settled by three disinterested persons, one to be selected by such owner, one by the person or company desiring the use of said poles, and the third by the two persons so selected; and the terms and conditions shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which said company or companies, respectively, shall use and occupy said poles. If the said owner shall, for thirty days after having been requested in writing to appoint its representative, fail to make such appointment, then the City Engineer shall make such appointment, and the person so appointed shall have the powers he would have had if he had been appointed by the said company. If the two arbitrators, selected in either of the two manners above specified, shall fail for thirty days after their appointment to select a third arbitrator, then the City Engineer shall select such third arbitrator, and when so selected, he shall have the same powers he would have had if he had been appointed by the two said arbitrators. Or, if after the three arbitrators shall have been appointed in any of the modes above specified, they shall fail to settle and determine said terms and conditions within thirty days from the date of the appointment of said third arbitrator, then the City Engineer shall have power to select a person who shall have power to settle and determine said terms and conditions. Should either the said owner, or any person or company that may, under this section, enter upon and use the poles of said owner, fail to keep and perform each and every one of the terms as to the use of said poles, the company so failing shall be liable to a fine of not less than ten nor more than one hundred dollars for such failure; each day's failure to be a separate offense. The said committee shall have the power to require said owner to allow any person or company desiring to enter upon and use said poles to so enter and use the same, under such conditions as the City Engineer may prescribe, as soon as the said person or company so desiring to enter shall

have appointed its arbitrator; but the person or company so entering shall do so under contract and bond that he or it will abide by and conform to the terms and conditions determined upon by the arbitrator, as soon as such decision shall be announced. And the said committee shall have the power, also, to require from time to time the said owner, or any other person or company using said poles, to afford and furnish such protection or protections to all wires on such poles as the said committee may deem proper or necessary in order to allow such wires to perform the purposes or functions for which they were intended. All work as to placing of wires now upon the poles of any other company shall be done at the cost and expense of the party desiring to use such poles. Each and every one of the above stated provisions shall respectively apply to poles now carrying electric light, electric power, and electric car wires, to the extent of entitling any person or company authorized by the Council to run wires over the streets and alleys, and authorized by said committee, in accordance with the terms of this ordinance, to place on any such pole any electric light, electric power, electric power wire, or other heavy current wires, which may be used for the transmission of electricity. For any failure to perform any requirement ordered under this section within ten days after being notified of such requirement, by the City Engineer, each party so in default shall be liable to a fine of not less than fifty nor more than five hundred dollars; each day's failure to be a separate offense.

5. Hereafter no pole shall be erected until the City Engineer shall have first determined upon the size, quality, character, number, location, condition, appearance and manner of erection of such pole.

6. Each and every permission herein given is granted upon the condition that the city shall have the right by and through the Board of Fire Commissioners to run all wires needed for the fire alarm and police telegraph department on all poles erected, or allowed under this ordinance to remain on any

street or alley of the city, and in such positions on said poles as shall seem proper to the superintendent of said department. Whenever any permission has been granted by the Council or Street Committee to any person or corporation to erect any pole or poles for the support of wires used for the transmission of electricity, it shall be the duty of such person or corporation, before erecting any such pole or poles, to submit to the Board of Fire Commissioners a diagram showing the proposed location of such poles, and arrangement of poles and wires, so as to enable said superintendent to select and require to be reserved such positions on any such pole or poles as he may deem proper and necessary.

7. No person or company shall use the pole, wires, or other apparatus above referred to, of any other person or company until he or it shall have filed with the City Engineer a written application fully setting forth what poles or other apparatus he or it shall desire to use, nor until receiving from said Engineer a written notification so that the said committee has given the applicant permission to so use the same in accordance with the provisions of this ordinance.

8. The City Council hereby reserves the right to put at any time other restrictions and regulations as to the erection and use of said poles, wires, and other apparatus used in connection with the transmission of electricity, and from time to time require such poles as it may deem proper to be removed, and the wires thereon to be run in conduits, upon such terms as the city may deem proper.

9. All persons and corporations having, using, or maintaining any telegraph, telephone, electric light or other poles in any of the parks, streets, lanes or alleys of the city of Richmond, shall annually, between the fifteenth day of December and the first day of January in each and every year, file with the City Engineer a list of all such poles so used, possessed or maintained by him or them, giving the accurate location of each of such poles, and the number and character of wires carried thereon, the names of the owners of said poles and of

the persons using the same, and shall at all times keep stamped, painted, or printed thereon, in legible characters, their name as owner upon each of such poles. A copy of such list shall be furnished by said Engineer to the City Auditor, and to the Superintendent of Fire Alarm and Police Telegraph.

10. Annually, between the first day of January and the fifteenth day of January, all persons or corporations shall pay to the City Treasurer, a fee of two dollars for each and every telegraph, telephone, electric light or other pole, used, possessed, or maintained by them in any of the parks, streets, lanes, or alleys of the city of Richmond, except trolley poles, used exclusively for stringing thereon wires for use in the propulsion, by electricity, of street passenger cars. Upon the receipt of the above fee by said Treasurer, the City Auditor shall deliver to the person or corporation paying the same, a tin plate, with a plain and conspicuous number thereon, to be provided in the manner prescribed in the next succeeding section, for each and every pole upon which the said license fee is paid, and shall also enter in a book, to be kept for that purpose, the name of the person or corporation to whom the license is issued, and the number of poles for which it is issued, and the number of tin plates delivered to the person paying such license fee; he shall also deliver to such person or corporation a certificate, under his own hand, that such person or corporation has paid the required license fee for that year on the specified number of poles, and has received the tin plates of the given numbers therefor; such person or corporation shall then have one of such tin plates securely fastened in some conspicuous place upon each of the poles used, possessed or maintained by it or him, as may be designated by said superintendent.

11. It shall be the duty of the City Auditor, annually, on or before the fifteenth day of January in each and every year, to purchase a sufficient number of tin plates, numbered with plain, conspicuous figures, beginning with number 1, and so on progressively, to be furnished, as prescribed in the preced-

ing section of this ordinance, to the persons or corporations using, possessing, or maintaining telegraph, telephone, electric light, or other poles other than trolley poles, used exclusively for stringing wires thereon, for use in the propulsion, by electricity, of street passenger cars; the City Auditor shall cause to be stamped with the proper die or painted on each of such tin plates the year in which they are issued; the said plates to be of suitable size and description, in the discretion of the City Auditor.

12. After the twentieth day of January, 1896, all telegraph, telephone, electric light and other poles in any of the streets, lanes and alleys of the city of Richmond (except trolley poles used exclusively for stringing thereon wires for use in the propulsion of street passenger cars), which shall not have been included in any list filed in accordance with the ninth section of this chapter, with the City Engineer, or upon which the name of the owner is not legibly painted, printed or stamped, or upon which the above mentioned license fee has not been paid, or on which the above prescribed tin plate is not securely fastened in some conspicuous place, shall be forthwith removed by its owner.

13. Any person, or persons, or corporation, using, possessing, or maintaining, any telegraph, telephone, electric light, or other poles, in any of the streets, lanes or alleys of the city of Richmond, who shall fail to file with the City Engineer the list as prescribed in section 9 of this chapter, or who shall fail to have stamped, printed or painted in legible characters his, or its name as owner upon each of such poles as prescribed in said section 9, by the twentieth of January of each and every year; or whom, if belonging to the classes required to pay a fee of two dollars on each pole by section 10, shall fail to pay the said fee, or shall fail to have the tin plate therein prescribed, securely fastened in some conspicuous place by the said twentieth day of January of each and every year, upon all such telegraph, telephone, electric light, or other poles so used, possessed and maintained by him or them,

shall be liable to a fine of not less than five, nor more than one hundred dollars, for each pole upon which he, they or it, are so in default; and each day of default to be a separate offense. Such fines to be imposed by the Police Justice of Richmond.

14. It shall be the duty of the Chief of Police to require the police captains of each police district to report to him on the last Monday in November of each year that they have examined each pole in their respective districts used for the support of wires, carrying electricity, and whether any or all are in safe condition. The said Chief of Police shall, upon receipt of such report, forward the same to the Superintendent of Fire Alarm and Police Telegraph, who shall require the person or company owning any such pole reported to be unsafe, and deemed by the said superintendent to be unsafe, to remove the same. Any such person or company who, after being so notified, shall fail to have the same removed within forty-eight hours after being so notified, shall be liable to a fine of not less than ten, nor more than fifty dollars; each day's failure as to each pole so declared unsafe shall be a separate offense.

15. The Chief of the Fire Department and the Superintendent of Fire Alarm and Police Telegraph shall each have power, and it shall be their duty to examine and inspect, from time to time, all poles and every wire or cable over the streets, public grounds or buildings, when such wire is designated to carry an electric current; shall notify the person or corporation owning or using such poles, when any such pole is unsafe or owning or operating any such wire or cable whenever its attachments, insulations, supports or appliances are unsuitable or unsafe, and that the said poles, wires or cables must be properly replaced, renewed, altered or constructed; and shall require the owner of any wire abandoned for use to remove the same. Any person or company failing to perform any requirements made of him or it by either the said Chief of Fire Department, or said Superintendent, under this section,

shall be liable to a fine of not less than five nor more than one hundred dollars; each day's failure to be a separate offense.

16. Any person or corporation who now has permission from the City Council to run wires over the streets or alleys in the city, or may hereafter obtain such permission, may obtain additional routes for its wires when his or its business shall demand the same, and when the said committee shall authorize such additional routes subject to the conditions, restrictions, limitations, and charges herein set forth.

17. All wires shall be fastened upon poles or other fixtures with glass, porcelain, or rubber insulators approved by the Superintendent of the Fire Alarm and Police Telegraph, and must be stretched tightly and fastened with a tie of the same kind of wire. No wire shall be stretched within four inches of any poles, building, or other object, without being attached to it and insulated therefrom. All wires strung on house tops must be at least nine feet clear of the roof.

18. No wire shall be within 25 feet of the pavement at the lowest point of sag between supports except where required to reach a lamp or other connections, and must then be protected by extra covering and rigidly fixed and out of the way. No wire shall be run within eighteen inches of the city wire. No tree shall be cut or disturbed without consent of the City Engineer.

19. All electric light and power conductors, except trolley wires, shall be secured to insulated fastenings, and covered with an insulation which is water proof on the outside and not easily worn by abrasion. Whenever the insulation becomes impaired it must be renewed immediately. All joints must be as well insulated as a conductor, and the insulation joints must be maintained.

20. Every wire or cable must be distinguished by a number plainly marked on each cross arm under the insulator. Day circuits must be conspicuously designated. All arc lamps must be so placed as to leave a space underneath of at least

nine feet clear between lamp and sidewalk. Every line for are light or power entering a building shall be controlled by a cut-off placed near the entrance, in sight and easily accessible.

21. With the construction of lines the insulation to be used must be approved by the Superintendent of Fire-Alarm and Police Telegraph in writing, filed with the Board of Fire Commissioners, and the insulation resistance must be maintained in accordance with the standard, and is to be not less than three megohms per mile per 100 volts. And under no circumstances shall underwriter's wire be used.

22. All connections with the lines of electric light or power conductors shall be made at right angles to the same; and connections to buildings shall be straight across to the building and then down the front of the building. The insulation must be preserved throughout the entire circuit, and if any portion of a lamp or fixture is a part of a circuit and can be touched, it must be insulated. All conductors shall have a resistance uniformly distributed of not more than 30 ohm per mile per ampere, and proportionately less for heavier currents.

23. All circuits for electric light or power must be tested every hour, and when a ground comes an effort must be made to remove it at once. Failing in this, the circuit must be discontinued until the insulation is restored. No unused loops from electric light circuits shall be allowed to remain after lamps have been taken away, except in cases where it is positively known that the lamp will be required again within three months, and where there is no underground current for that class of circuits. When allowed to remain the joint in the loop must be as well insulated as the line itself.

24. Nothing in this chapter is intended to relieve any person or company of any condition, restriction or requirement imposed upon said person or company by the ordinance in which it has been authorized to place in the streets or alleys any poles, wires or other apparatus for the transmission of electricity.

25. Each and every provision of this ordinance, unless otherwise provided, shall apply to any pole, wire or other apparatus used in connection with the transmission of electricity, hereafter erected in the streets or alleys, whether the same be erected by the way of repairs or for additional routes, or for any other purpose.

26. Any person violating any restriction, provision or condition imposed by this chapter, or failing to perform any requirement, made under this chapter by the City Engineer, the Superintendent of Fire Alarm and Police Telegraph Department, or Chief of the Fire Department, as to which there is not in this chapter a fine specially imposed, shall be liable to a fine of not less than ten, nor more than five hundred dollars, to be imposed by the Police Justice of said city; each day's violation, or failure, to be a separate offense.

27. The telegraph, telephone and electric light and power wires and cables, including feed (but excluding trolley wires), and all other appliances for conducting electricity, and the poles therefor heretofore and now being in any street, alley or public ground of the city, are hereby ordered to be removed from the following named streets, to-wit: On Broad street from the west side of Adams street to the east side of Eleventh street; on Bank street from the western side of Ninth street to the eastern side of Twelfth street; on Main and Cary streets from western side of Seventh street to eastern side of Fourteenth; on Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth streets from the northern side of Broad street to southern side of Cary street, within twelve months from the fifteenth day of June, 1896. Any company, corporation, partnership or individual owning or controlling any such overhead wires, cables or appliances or poles, that refuses, neglects or fails to remove them from overhead, within the time as hereinbefore provided, shall be liable to a fine of not less than \$100 or more than \$500, for each pole so remaining, to be imposed by the Police Justice of the city of Richmond; and for every week

of continued failure and neglect to remove them after the imposition of the fine above mentioned, such company, corporation, partnership or individual shall be liable to a fine of not less than \$100 nor more than \$500, to be imposed as above stated.

28. The City Council will grant permission to any company, corporation, partnership or individual to place its wires and electrical conductors in conduits under the surface of the streets of the city; any such individual, partnership, corporation or company desiring such permission shall petition to the Council therefor; such petition shall name the streets, alleys and the side and portions thereof to be used and occupied by said conduits, and shall submit a map, plans and details thereof to accompany such petition. Such permission shall be granted by the City Council under the conditions that the petitioner shall furnish a bond to the city to be approved by the Mayor, and in the penalty to be prescribed by such permission; that the pavement of the streets and alleys wherein such conduits are laid shall be properly replaced and shall be kept in proper repair, to the satisfaction of the City Engineer, and that the city shall be saved harmless from any and all damages arising from laying such conduits; that such conduits shall be of sufficient capacity to accomodate the wires in such streets and alleys and to provide for an increase thereof to at least the extent of 100%; such increase of space is not to be occupied by any such company, corporation, partnership, or individual, directly or indirectly, without the consent of the City Council; that the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires; after obtaining the consent of the City Council any other person or corporation now having wires in the streets, or hereafter desiring to run wires therein, may occupy proper and necessary portions of such conduits upon such terms as may be agreed upon with the petitioner, and in case of a disagreement, upon terms to be determined by arbitration as herewith provided; any such company, corporation,

partnership or individual so placing its wires underground in any street, alley, or public ground of said city, shall, upon notice from the city or any of its departments that a local improvement of gas, sewer, or water main, or branch thereof, is to be constructed or repaired in such manner as will necessitate the moving or altering of its conduit or conduits, or their appurtenances, of said individual, partnership, company or corporation, move or alter the same at its own expense, so as to permit the construction or the improvement where ordered, and should any company or corporation omit to comply with such notice, the conduit or conduits, or their appurtenances, may be altered or removed by the city and the cost and expense thereof recovered from such individual, company or corporation. Manholes shall at all times conform to the grades of the streets. The location, size, shape, and subdivision of such conduits, and the material of which they shall be made, and manner of construction, shall be satisfactory to the Committee on Streets. The work of laying underground conduits, tubes, pipes, electrical conductors, cables and wires, shall be under the direction and to the satisfaction of the Superintendent of Fire Alarm and Police Telegraph, who at all times shall have free and unobstructed access to the conduits, tubes, pipes, electrical conduits or cables, for the purpose of inspecting the same, or making connections therewith, for conduit wires or conductors, in use or to be used by the city.

29. Whenever any wire or cable run in such conduit shall come out of such conduit for the purpose of being continued and run over-head upon poles, all precautions which may be required from time to time by the Committee on Streets, shall be taken for the protection and safety of all persons and property.

30. The terms upon which any person or company, after obtaining permission from the City Council may enter with its wires and use such conduits shall be as follows: In the event that said owner and the person or company desiring to

use said conduit cannot agree upon satisfactory terms and conditions the same shall be settled by three disinterested persons, one to be selected by such owner, one by the person or company desiring the use of said conduits, and the third by the two persons so selected; and the terms and conditions which shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which said company or companies respectively, shall use and occupy said conduit. If the said owner shall, for thirty days after having been requested in writing to appoint its representative, fail to make such appointment, then the City Engineer shall make such appointment, and the person so appointed shall have the powers he would have had if he had been appointed by the said company. If the two arbitrators, selected in either of the two manners above specified, shall fail for thirty days after their appointment to select a third arbitrator, then the City Engineer shall select such third arbitrator, and when so selected he shall have the powers he would have had if he had been appointed by the two said arbitrators. Or if after the three arbitrators shall have been appointed in any of the modes above specified, they shall fail to settle and determine said terms and conditions within thirty days from the date of the appointment of said third arbitrator, then the City Engineer shall have the power to select a person who shall have the power to settle and determine said terms and conditions. Should either the said owner or any person or company that may, under this section, enter upon and use a conduit of the said owner, fail to keep and perform each and every one of the terms as to the use of said conduit, the company or person so failing shall be liable to a fine of not less than fifty, nor more than five hundred dollars for such failure; each failure to be a separate offense. The said committee shall have the power to require said owner to allow any person or company desiring to enter upon and use said conduit to so enter and use the same under such conditions as the City Engineer may prescribe, as soon

as the said person or company so desiring to enter shall have appointed its arbitrator; but the person or company so desiring to enter shall do so under contract and bond that he or it will abide by and conform to the terms and conditions determined upon by the arbitrators, as soon as such decision shall be announced. And the said committee shall have power also to require from time to time the said owner, or any other person or company using said conduit, to afford and furnish such protection or protections to all wires in such conduit as the committee may deem proper and necessary in order to allow such wires to perform the purposes or functions for which they were intended. For any failure to perform any requirements under this section, within ten days after being notified of such requirement by the City Engineer, each party so in default shall be liable to a fine of not less than fifty, nor more than five hundred dollars; each day's failure to be a separate offense.

31. No privilege as to the building and owning of said conduits shall last longer than fifteen years, at the expiration of which time the city may put such restrictions, conditions and charges as it may see fit, and shall be lawful, or may order its removal at the expense of the owner.

32. For the privilege of using and occupying the streets of the city, as herein proposed, each person or corporation owning or using any wire or wires run in such conduit shall each year, until January 1st, 1900, pay to the city treasurer a sum equal to \$2 per wire, per mile, so owned or used by said person or company. On and after January 1st, 1900, the City Council reserves the right to charge such larger compensation for the rest of the term of the privilege as it may see fit. Each person or corporation shall, on the fifteenth day of June and January of each year, pay to the city auditor a sum equal to \$1 per wire, per mile, then owned or used by such person or corporation, and shall render to the auditor a sworn statement as to the number and length of each of the wires then owned or used by him or it. The Committee on Finance

may, when it may see fit, have the books of the person or corporation rendering such statements examined by a book-keeper employed by said committee, to ascertain whether such statement is accurate. For failure to allow such examination, whether requested by the Finance Committee, the person or corporation owning any wires in such conduits shall be liable to a fine of not less than \$100 nor more than \$500 for each wire of said person or company admitted or proven to be in such conduit; and for failure to pay such semi-annual compensation upon the day above specified, the person or company shall be liable to a fine of not less than \$10 nor more than \$500; each day's failure to be a separate offense.

33. The conduits herein required shall be extended from time to time, whenever required by the City Council, to cover streets or alleys upon which the Council may determine, from time to time, that no overhead wire shall be run.

Exhibit No. 2, with Complainant's Bill.

AN ORDINANCE.

Approved March 15, 1902.

To amend and reordain section 27, of Chapter 88, Richmond City Code (1899), requiring Telegraph, Telephone and Electric Light and Power wires and Cables to be placed underground on certain streets of the city.

Be it ordained by the Council of the City of Richmond:

1. That section 27 of Chapter 88, Richmond City Code (1899), be amended and reordained so as to read as follows:

27. The telegraph, telephone and electric light and power overhead wires and cables (other than trolley wire-) and all other overhead appliances for conducting electricity, and the poles therefor heretofore and now being in any street, alley or public ground of the city, owned and maintained under any existing franchise, are hereby ordered to be removed from

the following named streets, to-wit: On Broad street, from the western side of Adams street to the east side of 11th street; on Bank street from the western side of 9th street to the eastern side of 12th street; on Main and Cary streets from the western side of 7th street to the eastern side of 14th street; on 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th streets from the northern side of Broad street to the southern side of Cary street, within twelve months from the date of the approval of this ordinance, and any such wires hereafter installed under any existing franchise or under any franchise hereafter granted shall, within the limits of the above described district, unless otherwise provided by the City Council, be placed underground within twelve months from the date of permission granted by the City Council. Any company, corporation, partnership or individual, owning or controlling any such overhead wires, cables or appliances, or poles, that refuses, neglects or fails to remove them from overhead within the time as hereinbefore provided, or which fails to place said wires, hereafter installed in the said underground district, underground as hereinbefore provided, shall be liable to a fine of not less than \$100 nor more than \$500 for each pole so remaining, to be imposed by the police justice of the city of Richmond, and for every week of continued failure and neglect to so remove them after the imposition of the fine above mentioned, such company, corporation, partnership or individual shall be liable to a fine of not less than \$100 nor more than \$500, to be imposed as above stated. And any overhead wires hereafter installed within the said underground district shall be installed subject to the provisions of this ordinance.

2. This ordinance shall be in force from its passage.

Exhibit No. 3, with Complainant's Bill.**AN ORDINANCE.**

Approved December 18, 1903.

To amend and reordain section 28 of Chapter 88, Richmond City Code, 1899, relating to the Telegraph, Telephone and Electric Light and Power wires and cables in conduit within certain territory.

Be it ordained by the Council of the City of Richmond:

1. That section 28 of Chapter 88, Richmond City Code, 1899, be amended and reordained so as to read as follows:

28. That all telegraph, telephone and electrical light and power wires and cables, including feed (but excluding trolley wires), and all other appliances for conducting electricity, shall be removed from the streets, alleys and public grounds of the city of Richmond within the territory mentioned in the foregoing section within six months after the passage of this ordinance, and every individual, partnership, corporation or company owning such wires within said territory shall within two months after the passage of this ordinance submit to the Committee on Streets and Shockoe Creek plans and details, showing the location, plan, size, construction and material of such conduits. Such plans may be altered or amended by said committee, and when satisfactory to it shall be approved, and thereupon it shall be the duty of the owner of such wires to proceed with the construction of such conduits in accordance with the plans so approved, and in a manner satisfactory to the City Engineer. The pavement of the streets and alleys wherein such conduits are laid shall be properly replaced, and shall be kept in proper repair to the satisfaction of the City Engineer, and the city shall be saved harmless from any and all damages arising from laying such conduits. Such conduits shall be of sufficient capacity to ac-

commodate the wires in such streets and alleys, and shall provide for an increase thereof to at least the extent of 30 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership or individual directly or indirectly, without the consent of the Committee on Streets and Shockoe Creek, but the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires. After obtaining the consent of the Committee on Streets and Shockoe Creek, any other person or corporation now having wires in the streets, or hereafter desiring to run wires therein, may occupy necessary and proper portions of such conduits upon such terms as may be agreed upon with the petitioner; and in case of a disagreement, upon terms to be determined by arbitration, as herewith provided; any such company, corporation, partnership, or individual so placing its wires under ground in any street, alley or public ground of said city shall, upon notice from the city or any of its departments, that a local improvement of gas, sewer or water main, or branch thereof, is to be constructed or repaired in such manner as will necessitate the moving or altering of its conduit or conduits, or their appurtenances, of said individual, partnership, or company or corporation, move or alter the same at its own expense so as to permit the construction of the improvement where ordered, and should any company or corporation omit to comply with such notice, the conduit, or conduits, or their appurtenances, may be altered or moved by the city, and the cost and expense thereof recovered from such individual, company or corporation. Manholes shall at all times conform to the grades of the streets. The location, size, shape and subdivision of such conduits, and the material of which they shall be made and the manner of construction, shall be satisfactory to the City Engineer. The work of laying underground conduits, tubes, pipes, electrical conductors, cables and wires, shall be under the direction and to the satisfaction of the Superintendent of Fire-Alarm and Police Telegraph, who shall at all times have free and unobstructed

access to the conduits, tubes, pipes, electrical conductors or cables, for the purpose of inspecting the same or making connection therewith for conduit wires or conductors in use or to be used by the city.

2. This ordinance shall be in force from its passage.

INJUNCTION ORDER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
against

CITY OF RICHMOND, Defendant.

This day came the complainant and filed its bill duly verified and thereupon it is ordered :

That the defendant, the city of Richmond, show cause before this court, at its court room in the city of Richmond on the 26th day of July, 1904, at the hour of twelve o'clock, why an injunction should not be granted, enjoining and restraining the city of Richmond, its attorneys, agents and servants and all others acting by, through or under its authority, from enforcing or attempting to enforce against the complainant the provisions and requirements of Chapter 88 of Richmond City Code, 1899, and the provisions and requirements of any or either of the various sections of said Chapter 88, and the provisions of the amendments to Sections 27 and 28 of said Chapter 88, and the provisions of any amendment to said Chapter 88, and from enforcing or attempting to enforce the penal features of said Chapter 88 and the amendments thereto and the fines and penalties, or any or either of them, imposed by said Chapter 88 and the amendments thereto, and from re-

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moving or attempting to remove from the streets and alleys of the defendant the poles, wires, cables and other appliances of complainant, or any or either of them, and from in any manner or to any extent interfering with the complainant or its property, and from in any manner, or to any extent obstructing the business of complainant.

And there appearing to be danger of irreparable injury from delay, it is ordered that in the meantime and until the further order of this court, the said city of Richmond, its attorneys, agents and servants, and all others acting by, through or under its authority, be, and they are, hereby temporarily enjoined and restrained from enforcing, or attempting to enforce, the fines and penalties, or any or either of them, imposed by said Chapter 88, and the amendments thereto, and from removing, or attempting to remove, from the streets and alleys of the city of Richmond, the poles, wires, cables and other appliances of the complainant mentioned in the bill.

But, the defendant may, prior to July 26, 1904, move to vacate this temporary restraining order after having first given to the plaintiff five days' notice of its purpose so to do.

The plaintiff, or some one for it, is required within two days from the date of this order, to execute before the clerk or his deputy of this court at Richmond, Virginia, a bond with security to be approved by a judge of this court in the penalty of \$5,000.00, conditioned to pay all damages and costs which may be adjudged against the plaintiff, in case the above restraining order shall be dissolved.

(SIGNED) EDMUND WADDILL, JR,
United States Judge.

Norfolk, Va., June 21, 1904.

A COPY _____

MARSHAL'S RETURN.

(52)

Executed the 22nd day of June, 1904, on the City of Richmond, Va., by delivering to Richard M. Taylor, Mayor of the City of Richmond, Va., a true copy of the within order, at his office in this city.

MORGAN TREAT, U. S. Marshal,
By SAMUEL BENDIT, Office Deputy.

Richmond, Va., June 22, 1904.

DECREE FILING DEMURRER AND SETTING DOWN SAME FOR ARGUMENT.

(53)

Entered and filed October 15, 1904.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Western Union Telegraph Co.	}	Decree.
vs.		
City of Richmond.		

This day came the parties by their counsel, and the hearing of this case on the temporary restraining order having been adjourned to this day, by consent of parties, without waiving or affecting any rights of either party, on the motion of the defendant, the City of Richmond, by counsel, leave is given it to file its demurrer to the complainant's bill, in which demurrer the complainant joined, and thereupon, on motion of the complainant, the same is set down for argument.

EDMUND WADDILL, Jr.,
U. S. Judge.

Richmond, Va., Octo. 15th, 1904.

DEMURRER OF DEFENDANT.

(54)

Filed October 15th, 1904.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Western Union Tel. Co.	}	Demurrer.
vs.		
City of Richmond.		

The demurrer of the City of Richmond to the bill of complaint in the above styled cause.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner or form as the same are therein set forth and alleged, doth demur to the said bill, and saith that the same is not sufficient in law, and for causes of demurrer sheweth.

1. That it appeareth by said plaintiff's own showing by the said bill that it is not entitled to the relief prayed for by the said bill against this defendant.

2. That the Act of Congress entitled: "An act to aid in the construction of telegraph lines and secure to the government the use of the same for postal, military and other purposes," approved July 24th, 1866, claimed in the said bill as furnishing protection to the said complainant against this respondent, does not give the complainant any right to locate or maintain its poles on or run its wires along the streets of the respondent, subject to reasonable regulations as to routes, position and number of poles and the manner of conducting its wires along said streets, either on poles or in conduits, as the respondent may require in the exercise of the police power vested in it under the laws of the land.

(55) 3. That notwithstanding the power of Congress in matters of Interstate Commerce, and notwithstanding the provisions of the said Act of Congress, approved July 24th, 1866, the complainant has no right to locate its poles on or run its wires along the streets of the respondent without the consent of the said respondent, and upon such reasonable terms as to the routes, position and number of poles, location of wires, either on poles or in conduits, and pay for the use of the said streets as the said respondent may reasonably impose.

4. That the said respondent, in and by said bill, does not state that the complainant has ever obtained from this respondent, as required by the statute law of this State, the consent of the Council of the City of Richmond to construct, maintain and operate its line of telegraph along or over the streets of the City of Richmond, which statute is now embodied in section 1287 of the Code of Virginia 1887.

5. That the complainant, by filing plans of proposed conduits under §28, as amended, by said chapter 88, would not concede to all of the provisions of said chapter, including the reservations of §§31, 32 and 33 and all reservations of the City of Richmond or its counsel of the right to impose new terms and

conditions upon the privilege of placing its wires in conduits within the underground territory of the City of Richmond, as alleged in said bill of complaint.

6. That the respondent would not, by filing such plans, substantially make a contract with this respondent and would thus find itself in the future unable to object to any additional burdens which the city might thereafter choose to impose with (56) reference to fees, licenses, taxes and charges or to its poles, wires, cables and other appliances, or to the continued use of its conduits, as alleged in said bill.

7. That the complainant company would not, as alleged in said bill, by the filing of plans and specifications under §28, rob itself of the protection of the said act of Congress of July 24th, 1866, and of the rights granted to it thereunder.

8. That the several ordinances of the City of Richmond codified and contained in chapter 88, and each and every section thereof, and especially §§1, 2, 3, 4, 6, 8, 10, 25, 26, 27, 28, 30, 31, 32 and 33 and the amendments to said §§27 and 28 are not grossly unreasonable and illegal and repugnant to Article 1, §8, of the Constitution of the United States, and Article 14, §1, of the amendments to the Constitution of the United States and of the Act of Congress of July 24th, 1866, as charged in complainant's bill.

9. That the complainant does not, in and by its said bill, allege or state any conduct of this respondent, or any action taken by it, to enforce any of the provisions of the sections of said chapter 88, which it claims to be unreasonable and illegal and repugnant to the aforesaid provisions of the Constitution of the United States and the aforesaid Act of Congress, except such conduct or action as seeks to enforce the provisions of said sections, §§27 and 28, and, therefore, the complainant cannot legally implead this respondent as to any of the matters or things complained of in said bill, except as to said §§27 and 28.

Wherefore and for other divers and good causes of demurrer, appearing on the face of the said bill, this defendant doth demur thereto. And it prays the judgment of the court (57) whether this respondent shall be compelled to make any answer to the said bill, and it may humbly pray to be hence dismissed with its reasonable costs in this behalf sustained.

THE CITY OF RICHMOND,

By Counsel.

H. R. POLLARD,
City Attorney.

I certify that the foregoing demurrer is, in my opinion, well founded in point of law.

H. R. POLLARD,
Counsel for City of Richmond.

STATE OF VIRGINIA, }
City of Richmond, } to-wit:

This day Carlton McCarthy personally appeared before me, a Notary Public for the State and City aforesaid, and being duly sworn, deposeth and says that he is the Mayor of the City of Richmond, and that the foregoing demurrer is not interposed for delay.

Given under my hand this 28 day of September, 1904.

R. T. LACY, JR.,
Notary Public.

**DECREE OVERRULING DEMURRER AND GRANTING LEAVE
TO DEFENDANT TO FILE ITS ANSWER WITHIN
THIRTY DAYS FROM DATE.**

(58) Entered and filed December 1, 1904.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

The Western Union Telegraph Company, }
Complainant. }
vs. }
City of Richmond, Defendant. }

This day this cause came on to be heard upon the demurrer of the defendant filed herein to the complainant's bill, and the court, after hearing the arguments of counsel and upon consideration whereof it is hereby ordered, adjudged and decreed that said demurrer be and the same hereby is overruled, with leave to the defendant to file its answer herein within thirty days from the date hereof.

EDMUND WADDILL, JR.,
U. S. Judge.

Richmond, Va., Dec. 1st, 1904.

DECREE FILING ANSWER OF DEFENDANT.

(59) Entered and filed January 2d, 1905.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Western Union Telegraph Co.	}	Decree.
<i>vs.</i>		
City of Richmond.		

This day came the defendant, the City of Richmond, by its solicitor and counsel, and on its motion leave is given it to file its answer in this cause, which is accordingly done.

EDMUND WADDILL, JR.,
U. S. Judge.

Richmond, Va., January 2nd, 1905.

ANSWER OF DEFENDANT.

(60) Filed January 2d, 1905.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

The answer of the City of Richmond to a bill of complaint exhibited against it in the Circuit Court of the United States for the Eastern District of Virginia, by the Western Union Telegraph Company, a corporation.

This respondent, without waiving its demurrer or any proper objection to the many errors and imperfections in the said bill of complaint, for answer thereto, or to so much thereof as it is advised it is material for it to answer, answering says:

1. That it is true, as alleged in the said bill, that this case is one arising between citizens of different States, and that the subject matter and the amount in controversy is of the value of more than two thousand dollars, exclusive of interest and costs, and is also one arising under the Constitution and laws of the United States, and that the complainant, in and by said bill, asserts rights and privileges under the acts of Congress and the Constitution and laws of the United States, against this respondent.

2. That it is also true, as alleged in said bill, that the Western Union Telegraph Company is a telegraph company and a corporation duly organized and existing under an act of the Legislature of the State of New York, entitled "An act to provide for the incorporating and regulating of telegraph companies," passed on the 12th day of April, 1848.

3. That it is also true, as alleged in said bill, that the City of Richmond is a municipal corporation incorporated and existing under the laws of the State of Virginia, and a citizen and (61) resident of the State of Virginia, having its principal office and place of business within the limits of the County of Henrico in the State of Virginia, and in the Eastern District of Virginia.

4. That this respondent has no means of knowing when the complainant was organized as a telegraph company or when it began the work of operation and construction of telegraph lines in the State of New York and other States, and, therefore, neither admits nor denies the statement in the bill made in regard to this particular matter, but admits as true the statement in the bill made, that the complainant has constructed and acquired a continuous system of telegraph lines, which now extend through all the territories and States of the United States and a portion of Canada, and connect with telegraph lines in the Republic of Mexico and other countries; but this respondent has no means of knowing the number of poles and cables controlled and maintained by the complainant, or the number of its officers, employees and agents, or the number of messages sent for the public and the government of the United States and for the government of foreign countries, and, therefore, neither admits nor denies said statements; but it admits as true the statement in the bill made, that its system of lines have been built up so as to connect with and be largely operated from the central office of the complainant, which is situated in the City of New York, and that said lines radiate therefrom as stated in section 4 of the bill of complaint, and also that among the lines of telegraph so operated by the complainant are the complainant's lines of telegraph constructed, maintained and operated over and along the streets of the City of Richmond, particularly described in section 4 of said bill.

5. Respondent admits the statements made in section 5 of said bill of complaint in regard to the act of Congress approved July 24th, 1866, but as to the recitals of the several requirements of said act or the amendments thereto, respondent says

that they speak for themselves, and also admits the truth of the statement in said fifth section made, to the effect that the complainant company did, on or about the 8th day of June, 1867, duly file its written acceptance with the Postmaster General of the United States of the restrictions and obligations of the said act, and therefore says that it is no doubt true, as alleged in said section 5, that the complainant has performed, and at the present time is performing, the obligations and requirements imposed by the said act of Congress of July 24th, 1866, to the government of the United States.

6. Respondent also admits the statement in the bill made in section 6, in regard to an act of Congress approved June 10th, 1872, and respondent does not deny, but admits, that complainant has complied with the said last named act and is carrying for the government of the United States, over its lines of telegraph situated along and over the streets and alleys of the City of Richmond, messages at a rate below that charged for similar services for messages sent on behalf of individuals.

7. Respondent does not deny, but admits, that all of the streets and alleys of the City of Richmond along and over which the complainant has erected its poles and strung its wires for the conduct of its business, are post roads under the act of Congress and the Revised Statutes and Constitution of the United States; but this respondent denies the deduction made therefrom that under said acts, Statutes and Constitution the complainant, by reason of its having filed its written acceptance with the Postmaster General of the restrictions and obligations of the said act of Congress of July 24th, 1866, and having complied with all the restrictions, obligations, duties and requirements of the said acts of Congress above referred to "has the right to construct, maintain and operate lines of telegraph over and along the streets and alleys within the defendant, the City of Richmond, in such manner as not to interfere with the ordinary travel thereon," without reference to the requirements of the Statutes of the State of Virginia and the ordinances of the City of Richmond, as to the location and operation of lines of telegraph within the State and city aforesaid; but on the contrary this respondent insists that according (63) to the spirit, true intent and meaning of the said act of Congress and the Statutes and Constitution of the United States the complainant company has no right, except in conformity with the Statute of the State of Virginia and ordinances of the City of Richmond to maintain and operate its lines of telegraph upon the streets and alleys of the City of Richmond; and in this connection respondent says:

(1) That on March the 17th, 1880, the date at which the American Union Telegraph Company, of which the complainant company is the assignee and successor, obtained permission from the Council of the City of Richmond to erect telegraph poles and run wires along and over the streets of the city, the Statute of the State of Virginia, authorizing telegraph companies to transact business in this State provided; that "any telephone or telegraph company, chartered by this State or any other State, or by an act of Congress of the United States, may construct and maintain such telephone or telegraph along any of the State or county roads or public works, and over the waters of the State, and along and parallel to any of the railroads in this State, provided the ordinary use of such roads, works, railroads and waters be not thereby obstructed and along the streets of any city or town, with the consent of the Council or trustees thereof, etc.," (Acts of the General Assembly of Virginia, 1879-1880, p. 53), which is substantially the same provision contained in the Code of Virginia, 1887, as section 1287. It thus plainly appears that under the Statute law of the State, in force at the date when the said American Union Telegraph Company, the assignor of the complainant, sought and obtained permission from the Council of the City of Richmond to exercise its rights as a telegraph company, that it could not lawfully obtain such rights from the City of Richmond except "with the consent of the Council" of the respondent city.

(2) That the said American Union Telegraph Company, recognizing its obligation to meet this requirement of the Statute, applied to the Council of the City of Richmond, and (64) that by an ordinance approved March 17th, 1880, leave was given the said American Union Telegraph Company to erect telegraph poles and string wires along and over the streets of the city, which ordinance is in the words and figures following:

AN ORDINANCE

To allow the American Union Telegraph Company to erect telegraph poles and run wires along certain streets.

(Approved March 17, 1880.)

Be it ordained by the Council of the City of Richmond, That leave is hereby given the American Union Telegraph Company by its officers, employees or agents, to erect the necessary poles, the same to be symmetrical in shape, properly painted, and duly secured from falling, to convey the wires of said company through the streets of the city from a point on Broad

street, near its intersection with Harrison street to Pine street; thence down Pine to Belvidere, along Belvidere from Grace to Canal; thence across Madison, Jefferson and Adams to Byrd street, along Byrd from Adams to Twelfth street, along Twelfth from Byrd to Canal street, Canal from Twelfth to Thirteenth, Thirteenth from Canal to Main street; the said poles to be erected inside of the curbstones, and with as little interruption to travel and traffic as possible, and under the general supervision and control of the City Engineer. It is further understood and agreed as part of the consideration of this contract, that the said American Union Telegraph Company shall not assign this route or privilege to any other person or corporation whatever, and that the privilege hereby granted shall be revocable at the pleasure of the Council." (Ordinances and Resolutions of the City Council of Richmond, 1878-1880, p. 28.)

(3) That on July 16th, 1881, the Council of the City of Richmond amended Chapter 34 of the City Ordinances, 1879, relating to streets, by adding two additional sections thereto, (65) the first of which prohibited the erection of any poles or posts by telegraph companies on Main street, in the City of Richmond, and the second of which transferred from the American Union Telegraph Company to the Western Union Telegraph Company, all rights and privileges to which the said American Union Telegraph Company was entitled under the ordinance approved March 17th, 1880, which said ordinance is in the words and figures following:

AN ORDINANCE

To amend Chapter 34 of the City Ordinances, concerning Streets.

(Approved July 16, 1881.)

"Be it ordained by the Council of the City of Richmond, That chapter 34 of the City Ordinances be amended by adding thereto the following sections:

"60. No telegraph poles or posts shall be erected on Main street, in the City of Richmond, or any part of said street, and all such poles or posts now on the said street shall be removed within thirty days from the due publication of this ordinance by the party or company maintaining or using the same. Every day's continuance of such pole or post on Main street after the expiration of such period of thirty days shall constitute a separate offence, and shall be punishable by a fine of not less than

five dollars nor more than ten dollars for each pole or post, recoverable in the Court of the Police Justice against the party, company or corporation maintaining or using the said pole or post.

"61. The privilege of erecting poles or posts in this city, granted the American Union Telegraph Company by an ordinance approved March 17, 1880, so far as the same is not inconsistent with the provisions of section 60 of this chapter, is hereby granted the Western Union Telegraph Company; but (66) all license or permission to any party or corporation to erect such poles or posts on Main street is hereby revoked and annulled." (Ordinances and Resolutions of the City Council of Richmond, 1880-1882, p. 17, Richmond City Code, 1885, p. 183.)

(4) That at a meeting of the Committee on Streets held on Friday, December the 9th, 1881, Major Robert Stiles appeared as attorney for the complainant company in regard to the removal of poles from Main street as required by the last above recited ordinance and made application on behalf of the complainant company, submitting the draft of a resolution in his own handwriting, having for its object the granting to the said complainant company a certain right along the streets of the city, and also relieving it of all penalties, if any, incurred by the said company under the said last recited ordinance, the draft of which resolution was duly recommended by the said Committee to the Board of Aldermen for adoption and was duly passed, and on January 5th, 1882, approved by the Mayor of the City of Richmond, all of which will more fully and at large appear by reference to the original draft of said resolution; an extract from the minutes of the proceedings of the Committee on Streets, held December 9th, 1881; a copy of the report of said Committee submitted to the Board of Aldermen on the — day of December, 1881, and an officially certified copy of said resolution approved by the Mayor on January 5th, 1882, herewith filed, marked exhibits "R" No. 1, 2, 3 and 4 respectively, and prayed to be taken and read as a part of this answer.

It thus appears that the complainant company, and its predecessor, the American Union Telegraph Company, fully understood and recognized the necessity of applying for and obtaining permission of the Council of the City of Richmond to erect its poles and run its wires along and over the streets and alleys of the said city, and that the conditions under which said consent was given were that the poles of the company should be erected and maintained "under the general supervision and

(67) control of the City Engineer," and the privileges thereby granted "should be revocable at the pleasure of the Council."

Respondent is advised, believes, and therefore charges, that the complainant company is estopped by its conduct in making application for and in accepting the privileges granted by the aforesaid ordinance, from claiming that the said act of the General Assembly of Virginia, and the said ordinances of the city are in violation, either of the acts of Congress or of the Constitution of the United States, and respondent is also advised, believes and charges that the said ordinances in connection with the acceptance of the provisions thereof by the complainant company, constitute a contract which the said company had the power to make and did make, and having thus accepted the privileges granted by the said ordinances and the advantages which sprung from them, said company cannot be permitted to hold on to the privileges or rights granted, and at the same time repudiate the conditions and restrictions placed upon it as conditions under which said privileges were granted. Respondent in effect said to complainant by the said ordinances, "You can occupy the streets under certain terms." The company accepted these terms and to permit it to repudiate the conditions under which it obtained such permission would be to allow said company to hold on to the privileges and rights granted, and, at the same time, repudiate the conditions, without the acceptance of which it could never have obtained the privileges which it sought.

8. Respondent admits that it has enacted an ordinance concerning wires, poles, conduits, etc., in, over and under the streets of the city, carried into and published as Chapter 88 of Richmond City Code, 1899, a copy of which is filed as Exhibit No. 1 with the bill and copies of certain amendments thereto, which are also filed as Exhibits Nos. 2 and 3; but this respondent denies that said ordinances and amendments are grossly unreasonable and illegal or in gross violation of and repugnant to Article 1, Section 2 of the Constitution of the United States, and Article 14, Section 1 of the Amendments to the Constitution of the United States and the said act of Congress approved July 24th, 1866, and the other acts of Congress particularly mentioned in said bill, and respondent also denies that said ordinance and amendments thereto are in gross violation of complainant's rights, powers and privileges under the aforesaid provisions of the Constitution of the United States and amendments thereto and the aforesaid enactments of Congress, and also denies that said ordinance and amendments thereto impose unreasonable and illegal burdens and restrictions upon the business of foreign and interstate commerce conducted by the com-

plainant or deprive the complainant of its rights, powers, privileges and property granted under said Statute and the Constitution of the United States; but on the contrary respondent is advised, believes and therefore charges, that the said ordinances, and the amendments thereto, are in every particular constitutional and valid and not, according to the true intent and meaning thereof, in conflict with the Constitution of the United States or the acts of Congress passed in pursuance thereof, but whether or not all of the provisions of said ordinances and amendments thereto be constitutional or not is a matter of no importance in this litigation, provided the special provisions of said ordinance, namely, Sections 27 and 28, as amended by the ordinances approved respectively March 15, 1902, and December 18, 1903, filed as Exhibits Nos. 2 and 3 with complainant's bill are valid and constitutional, nor is the constitutionality of these particular sections of any importance, provided it should be ascertained, as hereinbefore charged, that the complainant is estopped by its conduct from claiming that the said sections are unconstitutional. And in this connection respondent calls the attention of the court to the fact that there is no charge in the bill made that respondent is seeking to enforce against complainant any provisions of said ordinance or its amendments except the provisions of said Sections 27 and 28, and therefore all other questions attempted to be raised by said bill as to the illegality or unconstitutionality of the other sections of said (69) Chapter 88 are not questions, which the court cannot and will not pass upon or determine in this litigation.

Respondent does not admit, but on the contrary denies, that by the general scheme of Chapter 88 and the amendments thereto the construction and management of the complainant's telegraph lines, poles, wires, cables and conduits, and the control of its business, is taken largely out of its hands and is placed in the hands of the City Engineer of the City of Richmond and its Committee on Streets, and respondent says, in this connection, that so far as such construction or management is, by said Chapter 88, placed in the hands of the City Engineer and its Committee on Streets, the same is and was legally and constitutionally so done, in pursuance of that power residing in this respondent, ordinarily known as the "Police Power," and in pursuance of the express provisions contained in the grant by ordinances to the said complainant and its predecessor, the American Union Telegraph Company. And this respondent, protesting and insisting that it should not be called upon to answer the specific complaints made against the several sections of said Chapter 88, except Sections 27 and 28, relying upon the contention heretofore made that all such questions are aside from the real matter in controversy in this suit, without

waiving such objection, will now proceed to notice the objections to the several questions in the order mentioned in said bill of complaint.

(1) In answer to the said complaint, that Section 1 of said chapter confers upon the City Engineer the power to determine the size, quality, character, number, location, condition and appearance of the complainant's poles located in the city, and gives him the power to order changes in the location of same, etc., respondent says that this power is expressly reserved in each and every one of the three ordinances hereinbefore quoted relating to the erection of poles by the complainant and its assignor on the streets and alleys of the city; but independent of, and apart from, the express agreement between the complainant company and respondent contained in said ordinances, (70) it is clearly within the police power of respondent to exercise each, all and every of the powers conferred by said Section 1.

(2) That Section 2 of said chapter has no application whatever, as this respondent is advised, to the poles and wires of the complainant company for the reason that the complainant company is of that class of companies owning wires which is required by the ordinance of the City of Richmond to remove its wires and run the same in conduits, from which it follows that, if the complainant company should comply with Sections 27 and 28 of said ordinance, as amended, the provisions of said Section 2 would be inapplicable, so far as the residue of the poles and wires of the complainant company are not located within the underground territory, so that respondent denies that said sections practically and substantially annul the act of Congress approved July 24th, 1866.

(3) In response to the complaint made that the Committee on Streets can require the complainant to allow other persons or companies to put such wires upon its poles as will not, in the opinion of the said Committee, unreasonably interfere with the business of complainant, and upon such terms and conditions as may be agreed upon between the parties interested, this respondent says that said requirement is reasonable and just and is so recognized in other municipalities of any importance in the country, otherwise the streets of prosperous cities would become seriously obstructed by a great multitude of poles, each company having in such condition the right to erect and maintain its own poles; but however this may be, the complainant company, though it has to the present time acquiesced in said requirement, has never found it necessary to make com-

plaint to respondent of any injustice allowed or permitted, in this regard, nor has it in any way brought to the attention of respondent any act of injustice done to it, or encouraged or permitted by the respondent, its officers or agents, and if any such act should be done hereafter it will be time enough to make complaint, and respondent is advised that it must be presumed that no act of injustice will be done it in the future, and therefore (71) fore that complainant has no right to complain or implead the respondent in this behalf, until it can point to some act of injustice done to it in regard to the joint use of poles.

(4) In response to the objection to Section 5 of the said ordinance, which gives the City Engineer the power to determine upon the size, quality, character, number, location, condition and appearance and manner of erection of the poles of complainant, respondent says again, and here reiterates what it hereinbefore said, that this is one of the powers expressly conceded by the several franchise ordinances under which complainant accepted its privileges and has exercised the same since it commenced the transaction of business in the City of Richmond.

(5) As to the power given respondent to run its wires used in its fire alarm and police telegraph departments, on the poles of all persons or corporations occupying the streets with poles, without compensation, respondent says that this is a reasonable and proper requirement, consonant with the practice adopted in other cities of like size with the City of Richmond and intended to facilitate the preservation of property against destruction by fire and to arrest dangerous conflagrations, in the exercise of which privilege respondent is exercising a governmental power, promotive of the public weal, and the protection of the property of the complainant company itself and of the lives of its employees.

(6) In response to the objection in the bill of complaint made against Section 8 of said Chapter 88, respondent says that the reservation thereby made is not greater than the power residing in respondent by virtue of its police power and any stipulation by which respondent should attempt to exempt any company conducting so dangerous a business as that in which complainant is engaged, from its duty to submit its business to the supervision of the respondent, would be *ultra vires* and of no effect.

(7) Respondent denies that the provision contained in (72) Section 10 of said chapter requiring the payment of a

fee of \$2.00 for each and every telegraph pole used or maintained by any company erecting such poles on the streets, parks, lanes, or alleys of the City of Richmond is in violation of the provisions of the Constitution of the United States and the amendments thereof or the aforesaid acts of Congress, or that the same is an unreasonable, unwarranted and illegal burden upon the owner of such poles, but says that the imposition of said fee is constitutional, legal and reasonable, in view of the many expenditures made by the city to grade and improve its streets, parks, lanes and alleys where said poles are erected, so that the same could be more easily erected than could otherwise have been done, and in order to reimburse the city for the expense necessarily incurred to inspect the poles, wires and works of the complainant company; but, however this may be, the complainant by its long acquiescence in the payment of said fee without protest or objection, namely, from December 10, 1885, to the institution of this suit, in June, 1904, is now estopped from objecting to the said section on any of the grounds mentioned in the said bill of complaint.

(8) This respondent does not feel called upon to make any response to complainant's objection to Sections 13, 25 and 26 of said chapter, inasmuch as it does not specifically point out any objections to said sections, except in the general charge made in Section 13 of said bill of complaint, where it is alleged that said sections are grossly unreasonable and illegal and repugnant to the Constitution of the United States and the acts of Congress hereinbefore referred to, therefore respondent simply denies said charge so made.

(9) Respondent denies that Section 27 of said ordinance is grossly unreasonable and illegal and in violation of the rights, powers and privileges granted to the complainant under the aforesaid provisions of the Constitution of the United States and the acts of Congress, and that as a consequence said section is illegal and null and void, and while it may be true, but this respondent does not admit such fact to be, that the lines of telegraph of the complainant company, upon the streets and alleys of the City of Richmond, have been so constructed, maintained and operated and are now maintained and operated, so as not to interfere with the ordinary travel on the streets and alleys of the city, yet respondent denies the charge in the bill made that no proper or sufficient reason existed, or now exists, for the enactment of said Section 27 of Chapter 88, but on the contrary says that the presence of the poles and wires of the complainant company in the underground territory of the city, which is comparatively limited, and is located only in the most

populous and congested section of the city, is a constant and perpetual menace to life and property, and that the delay, and unwarranted refusal of the complainant company, to comply with the provisions of said section, and place its wires underground in accordance with said section and Section 28 operates as a denial of the just rights and privileges of the community, for the protection of the rights of which your respondent is charged under the Statutes and laws of the Commonwealth of Virginia; that the penalty imposed by said Section 27 upon any person refusing to comply with the provisions thereof, is not enormous or unreasonable, in view of the enormity of the offence committed by any party who refuses to comply with said section.

Respondent further says that said Section 28 complained of in said bill, prescribing the character, location and management of conduits is in all respects reasonable and just and consonant with similar requirements by other municipalities, and essential to a proper discharge of the duties imposed upon respondent to protect the life and property of its citizens against the inconveniences and dangers that would be occasioned by permitting persons constructing and maintaining conduits in the streets and alleys of the city so to do, without proper supervision and control; that the provision contained in Section 28, that said conduits shall be constructed at least 30 per cent. greater than the immediate needs of the person constructing them, is reasonable and just, and has been so held by courts of (74) highest repute, and in all other respects said section, as this respondent is advised, is reasonable, just and legal.

(10) In response to the objection made to Sections 30, 31, 32 and 33 of said Chapter 88, this respondent denies each and every statement in the bill made that the same are unreasonable, illegal and unconstitutional, and respondent specially insists that fifteen years continuous right of occupancy of the streets and alleys is a sufficient length of time to grant such privileges to any person or corporation; that in this age of rapid development and changing conditions, within that length of time it is not improbable that such conditions may arise, such inventions be made and put into practical use, that the uses of electricity with wires as conductors, may be totally abandoned and such wires and conduits rendered useless, in which event respondent should be in a position to compel the removal of such conduits from the streets and to restore the same to their former condition, at their cost.

9. Whether or not the complainant company, by filing plans of proposed conduits under Section 28 of said chapter,

would accept all of the provisions of said chapter, including the reservations of Sections 8, 31, 32 and 33 and all reservations of the City of Richmond by its Council, of its right to impose new terms and conditions upon the privilege of placing its wires in certain territory of the City of Richmond, respondent does not feel called upon to state, nor either to affirm or deny, said proposition. If it be, as the complainant says it is advised, that by filing said plans, it would substantially make a contract with the city and would then find itself in the future unable to object to any penal provisions that the city might choose thereafter to impose, then it is assuredly true that, by the acceptance of the privileges granted to the complainant and its predecessor, the American Union Telegraph Company, hereinbefore particularly described and mentioned, the complainant has already contracted with the City of Richmond not only to be subject to restrictions in regard to the conduct of its business, but also to a greater and more far-reaching effect, in that (75) the City of Richmond may irretrievably revoke, at its pleasure, all of the privileges to which complainant is entitled, and thereby deny to the complainant the right to conduct its business at all, within the limits of the City of Richmond. This power the respondent to the present time has not sought to exercise except conditionally, that is upon the condition that the complainant fails and refuses to place its wires underground within the very limited underground territory of the respondent, and respondent expresses the hope that it will not be driven to the necessity of exercising its contractual rights to compel the complainant company to cease to conduct its business within the limits of the City of Richmond, which, by the admission of the complainant, if the ordinance of the city be valid, the respondent has a right to do.

Respondent, further answering, says that if it be true, as stated in Section 9 of said bill, that the complainant, in filing plans and specifications as required in Section 28 of said chapter, would thereby deny to itself the protection of the act of Congress of July 24, 1866, and the rights granted to it thereunder, and would leave itself defenceless in the premises, etc., then this respondent says that complainant has, by its conduct in proposing, by its counsel, the resolution approved January 5th, 1882, and accepting the provisions thereof, by exercising the privileges therein granted for more than twenty years, already robbed itself of the protection of said act of July 24th, 1866, and the rights granted therein, should the City of Richmond, by two successively elected Councils, determine that it shall not longer conduct its business on the streets of the City of Richmond.

Respondent, further answering, says, in regard to the charge of the "abnormally developed" penal feature of the ordinance, that it is a matter of little moment to persons who obey the law what penalty is attached to the disobedience of it, for it is written "the law is a terror to evil-doers."

10. Respondent admits that, through its City Attorney, complainant was warned that, unless it complied with the provisions of said Sections 27 and 28, proceedings would be instituted against it to enforce the penalties thereof, but in explanation of its said conduct says that it has sought in vain to induce the complainant by persuasion and entreaties to comply with said sections and place its wires underground within the underground territory; that while other companies using electrical wires within said territory have complied with said sections, and while your respondent, at an outlay of not less than \$35,000.00, has removed its wires and the poles which supported them and placed the same in conduits, the complainant has persistently refused to comply with what respondent believes are just and reasonable requirements, embodied in said sections.

11. Respondent denies that complainant is without adequate remedy save in a court of equity, for in case of the imposition of a fine under an ordinance which was in violation of the United States Constitution the same might have been appealed to the Supreme Court of the United States.

12. It is true, as stated in Section 12 of said bill of complaint, that the complainant has paid to the respondent the taxes and charges therein mentioned.

13. Respondent again denies the general charge in this section made to the effect that Sections 1, 2, 3, 4, 5, 6, 8, 10, 13, 25, 26, 27, 28, 30, 31, 32 and 33, *and* grossly unreasonable and illegal and repugnant to the aforesaid provisions of the Constitution of the United States and the aforesaid acts of Congress.

14. Respondent neither admits nor denies the statement contained in Section 14 to the effect that the bill in this case has been prepared with great haste.

And this respondent having fully answered, prays that the injunction heretofore granted in this case may be dissolved, complainant's bill dismissed, and that this respondent may be dismissed with its costs in this behalf sustained.

In testimony whereof, this respondent hath caused these (77) presents to be subscribed by its Mayor and its corporate seal to be hereto affixed by its Treasurer.

CITY OF RICHMOND,
By CARLTON M'CARTHY, Mayor.

H. R. POLLARD, City Attorney,
Solicitor for the Defendant.

STATE OF VIRGINIA, }
City of Richmond, } to-wit:

I, Isaac Held, a Notary Public in and for the city aforesaid in the State of Virginia, do certify that Carlton McCarthy, Mayor of the City of Richmond, this day personally appeared before me in my said city and made oath that the statements contained in the foregoing answer, so far as based upon his own knowledge are true, and so far as based upon information derived from others he believes them to be true, and that the seal attached hereto is the seal of the City of Richmond.

Given under my hand this 29th day of December, 1904.

ISAAC HELD,
Notary Public.

EXHIBIT R, No. 1, WITH ANSWER.

Extracts from Minutes of Committee on Streets.

At a meeting of the Committee on Streets held on Friday, December 9, 1881, the following appears: * * *

Maj. Robt. Stiles appeared as attorney for the Western Union Telegraph Company in regard to removal of poles from Main Street in conformity with a recent ordinance and submitted a paper indicating the route, etc. * * *

Western Union Telegraph Co. as to poles on Main Street. On motion, it was recommended to the Council as follows:

(78) Whereas, the object of the ordinance of July 16th, 1881, requiring removal of poles and posts from Main Street, was to secure the unobstructed freedom of the principal thoroughfare of the city and not to raise revenue, and, whereas, the Western Union Telegraph Co. has signified its readiness without contest to remove its Main Street line, provided another suitable route be guaranteed to it; therefore, be it resolved, that all penalties, if any, incurred by said company under said ordi-

nance, be, and they are hereby, remitted, and the said company is hereby authorized and permitted to erect the necessary poles, the same to be symmetrical in shape, properly painted, and duly secured from falling, to convey the wires of said company through the streets of the city. A line from Main Street down Eighth to Cary, down Cary to Thirteenth Street, and up Thirteenth Street to the office of the company, on Main and Thirteenth Streets, on condition of the removal of said company's poles or posts from Main Street at its own expense within sixty days. Said poles to be erected inside of the curbstones and with as little interruption to travel and traffic as possible and under the supervision and control of the City Engineer, and the route hereby granted to be revoked by two successively elected Councils.

Correct Copy.

FRANK T. BATES,
Clerk Engineer's Department.

EXHIBIT R, No. 2, WITH ANSWER.

Whereas, the object of the ordinance of 1881, requiring removal of poles and posts from Main Street, was to secure the unobstructed freedom of the principal thoroughfare of the city, and not to raise revenue; and, whereas, the Western Union Telegraph Company has signified its readiness, without contest, to remove its Main Street line, provided another suitable route be guaranteed to it; therefore, be it resolved, that all penalties, if any, incurred by said company under said ordinance be, and they are hereby, remitted, and said company is hereby authorized and permitted to erect and maintain without disturbance by the city, a line for the transaction of its business, from Main Street down Eighth to Cary, down Cary to Thirteenth and up Thirteenth to the office of the company, on Main Street, on condition of the removal of said company's poles or posts from Main Street, at its own expense, within sixty days, and the route thus granted to be revoked by two successively elected Councils.

Correct Copy.

FRANK T. BATES,
Clerk Engineer's Department.

EXHIBIT R, No. 3, WITH ANSWER.

Richmond, Va., December 12th, 1881.

To the President and Members of the Board of Aldermen:

Gentlemen:—The Committee on Streets submit the following and ask your approval of the same:

Resolved, the Common Council concurring:

Whereas, the object of the ordinance approved July 16th, 1881, requiring the removal of poles and posts from Main Street, was to secure the unobstructed freedom of the principal thoroughfare of the city, and not to raise revenue, and, whereas, the Western Union Telegraph Company has signified its readiness, without contest, to remove its Main Street line, provided another suitable route be guaranteed to it; therefore, be it resolved, that all penalties, if any, incurred by said company under said ordinance be, and they are hereby, remitted, and said company is hereby authorized and permitted to erect the necessary poles, the same to be symmetrical in shape, properly painted and duly secured from falling, to convey the wires of said company through the streets of the city by the following (80) line: From Main Street down Eighth to Cary Street, down Cary Street to Thirteenth Street and up Thirteenth Street to the office of the company, corner Thirteenth and Main Streets, on condition of the removal of said company's poles or posts from Main Street, at its own expense, within sixty days; the said poles to be erected inside of the curbstones, and with as little interruption to travel and traffic as possible, and under the general supervision and control of the City Engineer, and the privilege hereby granted shall be revocable by two successively elected Councils.

Correct Copy.

FRANK T. BATES,
Clerk Engineer's Department.

EXHIBIT R, No. 4, WITH ANSWER.

Resolved, the Common Council concurring: Whereas, the object of the ordinance approved July 16th, 1881, requiring the removal of poles and posts from Main Street, was to secure the unobstructed freedom of the principal thoroughfare of the city, and not to raise revenue; and, whereas, the Western Union Telegraph Company has signified its readiness, without contest, to remove its Main Street line, provided another suitable route be guaranteed to it; therefore, be it resolved, that all penalties, if any, incurred by said company under said ordinance be, and they are hereby, remitted, and said company is hereby authorized and permitted to erect the necessary poles—the same to be symmetrical in shape, properly painted, and duly secured from falling—to convey the wires of said company through the streets of the city by the following line: From Main Street down Eighth to Cary Street, down Cary Street to Thirteenth Street, and up Thirteenth Street to the office of the company, corner Thirteenth and Main Streets, on condition of the re-

removal of said company's poles or posts from Main Street at its own expense, within sixty days; the said poles to be erected inside of the curbstones and with as little interruption to travel (81) and traffic as possible, and under the general supervision and control of the City Engineer. And the privilege hereby granted shall be revocable by two successively elected Councils.

Adopted by Board of Aldermen December 12, 1881.

Concurred in by Common Council January 2, 1882.

Approved by the Mayor January 5, 1882.

A Copy—Teste:

BEN. T. AUGUST,
City Clerk.

**DECREE ENLARGING TIME FOR COMPLAINANT TO AMEND
ITS BILL UNTIL RULES TO BE HOLDEN ON
MONDAY, APRIL 3. 1905.**

(82) Entered and filed March 7, 1905.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

The Western Union Telegraph Company,	}	In Equity.
Complainant,		
against		
City of Richmond, Defendant.		

On motion of the complainant and for good cause shown and by consent of the defendant, it is ordered that the time for the complainant to amend its bill, if it shall be so advised, be and the same is hereby enlarged until the Rules to be holden on Monday, April 3, 1905.

EDMUND WADDILL, JR.,
U. S. Judge.

Richmond, Va., March 7th, 1905.

(83) Entered and filed March 18, 1905.

**DECREE FILING AMENDED BILL AND WAIVER BY
DEFENDANT OF PROCESS THEREON.**

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

The Western Union Telegraph Company,	}	In Equity.
Complainant,		
against		
City of Richmond, Defendant.		

On motion of the complainant by its solicitor and counsel and for good cause shown, leave is given it to file its amended bill in this cause, and thereupon came the complainant, The Western Union Telegraph Company and by leave of court filed its amended bill of complaint against the defendant, the City of Richmond. And thereupon the City of Richmond, by H. R. Pollard, Esq., its City Attorney, appeared and waived the issuance and service of process upon said amended bill.

EDMUND WADDILL, JR.,

March 18th, 1905.

U. S. Judge.



1

In the Circuit Court of the United States
FOR THE EASTERN DISTRICT OF VIRGINIA.

THE WESTERN UNION TELEGRAPH
COMPANY,
Complainant,

AGAINST

CITY OF RICHMOND,
Defendant.

2

Amended Bill
in Equity.



TO THE HONORABLE, THE JUDGES OF THE CIRCUIT COURT
OF THE UNITED STATES FOR THE EASTERN DIS- 3
TRICT OF VIRGINIA :

The Western Union Telegraph Company, a corpor-
ation duly organized and existing under the laws of
the State of New York, and a citizen and resident of
said State, having its principal place of business in the
State of New York and in the Southern District thereof,
brings this, its amended bill of complaint, against the
City of Richmond, a municipal corporation incorpor-
ated and existing under the laws of the State of Vir-
ginia, and a citizen of the State of Virginia, having its
place of residence and its principal office and chief
place of business within the territorial limits of Henrico
County in the State of Virginia, and in the Eastern
District of Virginia, and says :

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ARTICLE I.

That this case is one arising between citizens
of different states, and that the subject matter
thereof and the amount in controversy is of the value

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of more than two thousand dollars, exclusive of interest and costs, and is also one arising under the Constitution and laws of the United States, in that your orator, the Western Union Telegraph Company, asserts rights and privileges under Acts of Congress and the Constitution and Laws of the United States against the above named defendant.

ARTICLE II.

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That your orator, the Western Union Telegraph Company, is a telegraph company and a corporation duly organized and existing under an act of the legislature of the State of New York entitled "An Act to provide for the incorporating and regulation of telegraph companies," passed on the 12th day of April, 1848.

ARTICLE III.

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That the defendant, the City of Richmond, is a municipal corporation, incorporated and existing under the laws of the State of Virginia, and a citizen and resident of the State of Virginia, having its principal office and place of business within the territorial limits of the County of Henrico in the State of Virginia, and in the Eastern District of Virginia.

ARTICLE IV.

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That your orator was thus organized as a telegraph company in the year 1851, and immediately thereafter began the work of construction and operation of telegraph lines in the State of New York and other states, and has continuously, since that time, been engaged in the work of constructing and operating telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired a continuous system of telegraph lines which now extends through all the states and territories of the United States, and into portions

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of the Dominion of Canada, and connects with telegraph lines in the Republic of Mexico and through the said land-lines of Mexico with the telegraph lines of the Central and South American Republics, and by means of submarine cables with the telegraph systems of foreign countries ; that at the present time its said system of telegraph lines operated and controlled by it, as aforesaid, comprises about 200,000 miles of poles and cables, and over 1,200,000 miles of wire ; that upon the said system of telegraph lines your orator has over 23,000 offices, and transmits yearly about 68,000,000 messages for the public and for the Government of the United States, and for the governments of foreign countries, exclusive of messages transmitted upon railway business, exclusive of office messages for your orator, and exclusive also of messages forwarded by private parties leasing wires from your orator ; that said system of lines has been built up so as to connect with and be largely operated from the central office of your orator, which is situated in the City of New York, and the said lines radiate therefrom to all the important cities and commercial centers and to many thousand towns and villages in the United States and in North America and through the ocean cables and land lines above described to all the important commercial centers of this continent and the continent of Europe, and through lines there situated with the telegraph lines in all parts of the world ; that among the lines of telegraph forming an important part of said system of your orator, and connected with its main office, as aforesaid, in the City of New York, and connecting with other lines of its telegraph leading to the important commercial centres of the South, Southwest, and elsewhere, are your orator's lines of telegraph constructed, maintained, and operated over and along the streets and alleys of the said City of Richmond, including all of its lines within the following territory in said city, to wit, Broad Street from the western side of Adams Street to the eastern side of Eleventh Street ; on Bank Street

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from the western side of Ninth Street to the eastern side of Twelfth Street; on Main and Cary Streets from the western side of Seventh Street to the eastern side of Fourteenth Street; on Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Streets from the northern side of Broad Street to the southern side of Cary Street, being the district designated as the "Underground district," by Section 27 of Chapter 88 of the Richmond City Code of 1899, and

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amendments thereto, and upon and over which are continuously transmitted messages for the Government of the United States, and messages relating to interstate commerce for the public and to commerce with foreign nations.

That said lines of telegraph in and through the said City of Richmond were originally constructed about the year 1880 by the American Union Telegraph Company, a corporation duly organized under the laws of the State of New York, which said American Union Telegraph

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Company, on or about the year 1881, in accordance with the laws of the State of New York, was duly consolidated with The Western Union Telegraph Company, and thereby the said lines of telegraph formerly belonging to the said American Union Telegraph Company became and at all times since said consolidation have been the property of The Western Union Telegraph Company and that the said City of Richmond has at all times since said consolidation recognized the right of your orator The Western Union Tel-

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graph Company in and to the said telegraph lines thus constructed, and your orator has at all times since maintained and operated said lines as a part of the system of telegraph lines owned, controlled, and operated by it.

ARTICLE V.

Your orator further represents that by an act of Congress of the United States approved July 24th, 1866, entitled, "An Act to aid in the construction of

telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes," the provisions of which are substantially preserved in sections 5263 to 5268 inclusive, Title LXV of the Revised Statutes of the United States, it was provided as follows :

"Sec. 1. That any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States : Provided, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station ; but such stations shall not be within fifteen miles of each other.

"Sec. 2. That Telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General."

"Sec. 3. That the rights and privileges hereby granted shall not be transferred by any company acting under this Act to any other corporation, association or person : Provided, however, That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent,

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disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected."

"Sec. 4. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this act." 14 Stat. 221, c. 230.

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Subsequently, by an act approved June 8, 1872, all the waters of the United States during the time the mail was carried thereon; all railways and all parts of railways which were then or might thereafter be put in operation; all canals and all plank roads; and all letter carrier routes established in any city or town for the collection and delivery of mail matter by carriers, were declared by Congress to be "post roads." 17 Stat. 308, c. 335. These provisions are substantially preserved in section 3964 of the Revised Statutes of the United States.

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By an act approved March 1, 1884, "all public roads and highways, while kept up and maintained as such," were declared to be "post routes." 23 Stat. 3, c. 9.

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Your orator further says that, complying with the provisions of said Act of Congress, of July 24th, 1866, it did, on or about the 8th day of June, 1867, duly file its written acceptance with the Postmaster-General of the United States of the restrictions and obligations of said Act, and thereupon your orator became entitled to all the rights and privileges conferred by said Act, and burdened with all the obligations imposed thereby, and it has continuously, since the filing of its said written acceptance, as aforesaid, fully performed, and at the present time is fully performing, all the obligations and requirements of said Act, and has carried upon its lines of telegraph (including its lines in said City of Richmond), messages for the Government of the United States and for the several departments thereof, giving the said messages priority over all other business and

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at rates annually fixed by the Postmaster General, which rates are much less than the ordinary reasonable rates charged to and paid by individuals and the public for the transmission of like messages and communications.

ARTICLE VI.

Your orator further says that, by an act of Congress approved June 10th, 1872, entitled "An Act making appropriations for sundry civil expenses of the Government, for the fiscal year ending June 30th, 1873, and for other purposes," the following was among other things enacted :

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" Provided that the Secretary of War be and he hereby is authorized and required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports and signals as may be found necessary for the benefit of agricultural and commercial interests ; and provided that no part of this appropriation, nor of any appropriation for the several departments of the government shall be paid to any telegraph company which shall neglect or refuse to transmit telegraphic communications between said departments, their officers, agents, or employes, under the provisions of the second section of Chapter 230 of the statutes of the United States for the year 1866, and at rates of compensation therefor to be established by the Postmaster-General ; provided also that, whenever any telegraphic company shall have filed its written acceptance with the Postmaster-General of the restrictions and obligations required by the Act approved July 24th, 1866, entitled ' An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes,' if such company, its agents or employes shall hereafter refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act or by the joint resolution approved on the 9th day of February, 1870, ' to authorize the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent and for giving notice on the northern lakes and seaboard of

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the approach and force of storms,' such telegraph company shall forfeit and pay to the United States not less than one hundred and not exceeding one thousand dollars for each refusal or neglect aforesaid, to be recovered by an action or actions at law in any District Court of the United States."

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Your orator avers that, in compliance with the said last named Act, it has carried for the Government of the United States over its lines situated over and along streets and alleys of the City of Richmond, mentioned in said chapter 88 of the Richmond City Code of 1899, and especially along the streets and alleys mentioned in the ordinance of the City of Richmond entitled "An ordinance to amend and re-ordain section 27 of chapter 88, Richmond City Code (1899) requiring Telegraph, Telephone and Electric Light and Power Wires and Cables to be placed underground on certain streets of the city" approved March 15, 1902, and upon its other telegraph lines connected therewith at all times

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since the passage of said Act, at rates far below the reasonable rates charged to and paid by individuals or by the public for similar services, communications relating to the meteorological and signal service from the various stations maintained by the Government of the United States throughout the interior of the continent, and along the seaboard, such communications being especially difficult of transmission from the fact that they are for the most part written in cipher, for the purpose of saving expense to the Government of the United States, and many words are indicated by a single arbitrary word or character; but that, nevertheless, even at the reduced rates at which your orator carries such communications, the charges amount to many thousands of dollars annually.

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ARTICLE VII.

Your orator further represents that said Acts of Congress apply to all streets and alleys within the defendant, the City of Richmond, and that all streets and

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alleys within the defendant, the City of Richmond, are post roads under Acts of Congress and the Revised Statutes and the Constitution of the United States; and that your orator, The Western Union Telegraph Company having duly filed its written acceptance with the Postmaster-General of the restrictions and obligations of the said Act of Congress of July 24th, 1866, and having fully complied with all the restrictions, obligations, duties, and requirements of said Acts of Congress above mentioned, has the right to construct, maintain, and operate lines of telegraph over and along all streets and alleys within the defendant, the City of Richmond, in such manner as not to interfere with the ordinary travel thereon, and subject only to such lawful regulations and restrictions as the said City of Richmond might impose in the proper and lawful exercise of the police power. 34

That the said grant by the United States in and by the aforesaid Acts of Congress of the right to construct, maintain and operate its lines of telegraph upon all streets and alleys of the City of Richmond was a grant made upon a full, valuable, and continuing consideration paid and rendered by your orator to the United States, which consideration was an agreement of your orator evidenced by your orator's written acceptance of the Act of Congress of July 24th, 1866, duly filed with the Postmaster-General, of the restrictions and obligations of the said Act, as hereinbefore set forth, and the full and continuous performance by your orator of all the obligations and duties created and imposed by said Acts of Congress. That your orator has since said acceptance of said Act performed all the obligations and duties required by said Acts and by law, and your orator has ever since the date of filing of said acceptance given, and is still giving to the United States, and to the several departments of the Government, and their officers, priority over all other business in the transmission of telegrams on all of the lines of your orator, including the lines of your orator, situated over and along the streets and 35 36

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alleys of the defendant, the City of Richmond, at rates annually fixed by the Postmaster-General, which rates are far less than the rates charged, paid and received by your orator for the same kind of services from the public, and greatly less than the reasonable value of the said services rendered by your orator to the Government. Your orator has accepted, among others, the provisions of the said Act of Congress of July 24th, 1866, giving to the United States the right to

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purchase all of its telegraph lines and effects at an appraised value to be ascertained by five competent disinterested persons as provided by the said Act of Congress. Your orator states that by reason of the premises, its acceptance of the said Act of Congress, the construction and maintenance of its telegraph lines thereunder, and the continued performance by your orator of the requirements of the said Acts of Congress, the right granted by the said Act of July 24, 1866, to

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your orator to construct, maintain, and operate its lines of telegraph over and along the streets and alleys of the defendant, the City of Richmond, became vested, and the said grant is in full force and effect, and your orator avers that its right to construct, maintain, and operate its said lines of telegraph over and along the streets and alleys of the defendant, the City of Richmond, is complete; and your orator further states that it has constructed, maintained, and operated, and is now maintaining and operating its lines of telegraph in the City of Richmond so as not to interfere

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with the ordinary travel on the streets and alleys of said city, and that, subject to all reasonable and lawful police regulations of said City of Richmond, and within the provisions of said Act of Congress of July 24th, 1866, it is entitled to all the rights, powers, and privileges conferred by said Act.

ARTICLE VIII.

Your orator further represents that the said city of Richmond, defendant herein, ordained and en-

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acted an ordinance concerning wires, poles, conduits, etc., in, over, and under the streets in said city, which was carried into and forms Chapter 88 of the Richmond City Code, 1899, a copy of which Chapter 88 is hereto attached, made a part of this bill, and marked "Exhibit No. 1".

That on or about the 15th day of March, 1902, said City of Richmond amended and re-ordained Section 27 of said Chapter 88 of the Richmond City Code, 1899, a copy of which amendment is hereto attached, marked "Exhibit 2" and made part of this bill.

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That subsequently, and on or about the 12th day of December, 1903, said City of Richmond amended and re-ordained Section 28 of said Chapter 88 of the Richmond City Code, 1899, copy of which amendment is hereto attached, marked "Exhibit No. 3" and made a part of this bill.

Your orator avers respecting said ordinance and the amendments thereto that the same are in gross violation of and repugnant to Article 1, Section 8, of the Constitution of the United States, and Article V. and Article 14, Section 1, of the Amendments to the Constitution of the United States, and are in gross violation of and repugnant to the rights and privileges granted to your orator by the said Act of Congress of July 24, 1866, and the said other acts of Congress hereinbefore in this bill mentioned; that the said ordinance and said amendments thereto are in gross violation of your orator's rights, powers and privileges under the aforesaid provisions of the Constitution of the United States and the amendments thereto and the aforesaid enactments of Congress and impose unreasonable and illegal burdens and obstructions upon foreign and interstate commerce, and upon the business of foreign and interstate commerce conducted by your orator on and over the said lines of telegraph hereinbefore set forth and upon your orator as an agent of the Government of the United States under said Act of Congress of July 24, 1866, and deny to, and deprive your orator of its rights, powers, privileges,

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and property, guaranteed to it under the Constitution of the United States, the amendments thereto and the various Acts of Congress hereinbefore set forth without due process of law and without compensation.

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Your orator avers that the conditions, regulations and restrictions prescribed by the said City of Richmond in said Chapter 88 and the amendments thereto, when examined, will appear to be stimulated by a desire to oppress and control or defeat the existence of your orator within the limits of the City of Richmond and to bring the control of your orator's property and business wholly under the management of the agents and employees of said City of Richmond, and are not within the lawful exercise of the police power vested in the said City of Richmond.

ARTICLE X.

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Your orator avers that in and by Section 1 of said Chapter 88, the right of your orator to construct, maintain and operate poles and wires upon the streets of the City of Richmond, as provided in said Act of Congress, is sought by the City of Richmond to be made subordinate to the said city by the requirement that no pole shall be erected or other apparatus used in connection with the transmission of electricity be placed in position in any street or alley in said city, until the City Engineer shall have determined the size, quality, character, number, location, condition, appearance, and

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manner of erection of such poles or other apparatus, and by the further requirement that there is vested in the City Engineer the power of changing the size and location and making any change in the condition of the wires, apparatus and poles of your orator's telegraph system, as said engineer may see fit to direct, without any provision in said section for any appeal from any requirement of the said city engineer, no matter how unreasonable or injurious such requirement may be upon the business and property of your orator.

ARTICLE XI.

By Section 2 of said Chapter, your orator's property and business is further sought to be brought under the control and management of the officials of the said city of Richmond by the broad requirement that all poles now erected in the streets or alleys of said city including those belonging to your orator (except such as support wires required by the city ordinances to be removed and run in conduits), shall hereafter be allowed to remain only upon the terms and conditions in said Chapter 88 set forth. 50

ARTICLE XII.

Your orator says that Section 4 of said ordinance is unreasonable and interferes with your orator's right of control and management of its business and is not a legitimate police regulation in that it vests in the committee on streets of the said city the right to allow any other person or company to place upon the poles of your orator any telegraph, telephone, or any other low-current wire which may be used for the transmission of electricity, which will not in the opinion of said committee unreasonably interfere with the business of your orator, and upon such terms and conditions as may be agreed upon by your orator and the owner of said wires, and in the event of the refusal of your orator to agree to the terms and conditions proposed by the owner of said wires, compels your orator to submit to an arbitration, and in the event of the refusal to make such arbitration, then vests in the city engineer the right to appoint an arbitrator who shall have the power to fix the terms and conditions upon which said party shall be permitted to occupy the poles of your orator, without regard to the extent of interference with the business of your orator and to fix the terms and condition to which your orator must submit, with no right of appeal therefrom, no matter how 51 52

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unreasonable or unjust the award may be, and providing that if your orator fails to abide by and perform the terms fixed by the said arbitrators thus appointed by the city engineer, it shall be liable to a fine of not less than ten nor more than one hundred dollars, and each day's refusal shall be treated as a separate offense.

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Said Section 4 is further unreasonable and illegal in that it requires your orator to furnish such protection or protections to all wires on said poles as the said committee may deem necessary in order to allow such wires to perform the purposes or functions for which they were intended, and in that it further provides that for any failure to perform any requirement ordered under this section, no matter how unreasonable or injurious to the property or business of your orator, said requirement may be, your orator shall be liable to a fine of not less than fifty nor more than five hundred dollars, and each day's failure is constituted a separate offense.

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ARTICLE XIII.

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Your orator avers that Section 5 of said Chapter 88 violates the rights guaranteed to your orator under the provisions of said Act of Congress approved July 24, 1866, in that it subjects your orator's construction and maintenance of telegraph lines wholly to the city engineer of said city by the requirement prohibiting the erection of any pole until the city engineer shall have determined first the size, quality, character, number, location, condition, appearance and manner of erection of such pole, thereby subjecting the business of your orator wholly to the arbitrary discretion, without right of appeal therefrom, of the said city engineer.

ARTICLE XIV.

Your orator avers that the provisions of Section 6 of said Chapter 88 are unreasonable, in that, while the Act of Congress of July 24, 1866, gives to your orator the right to construct, maintain and operate wires over and along the streets of the said City of Richmond, subject only to the lawful exercise of the police power of said city, said Section 6 of said Chapter 88 makes your orator's right to construct and maintain its poles and wires and lines upon the streets of said city subject to the condition that it shall furnish free of charge to the said city space upon said poles to run all wires needed, in the opinion of the Board of Fire Commissioners, for the fire-alarm and police departments of said city, and in such position on said poles as shall seem proper to the superintendent of said department, thereby compelling your orator to grant to the said city without compensation therefor, the use of so much of its said property as the said city may see fit to occupy for the said purposes, as a condition for the exercise of the privileges granted to your orator under the said Act of Congress.

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ARTICLE XV.

Your orator avers that Section 8 of said Chapter 88 is violative of your orator's rights as granted to it under the Constitution of the United States and the Acts of Congress, in that all the construction and maintenance of telegraph lines in and upon the streets of the said City of Richmond is sought by said Section 8 to be made subject to the right reserved in said Section 8, to place, at any time, by said council of the City of Richmond in its discretion, other restrictions and regulations as to the erection and use of the poles and wires and apparatus of your orator, or from time to time, require such poles to be removed from the

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said streets and the wires to be run in conduits, upon such terms as the said City of Richmond may deem proper.

ARTICLE XVI.

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Your orator avers that Sections 9, 10, 11, 12, and 13 of said Chapter 88 violate your orator's rights under the said Act of Congress in that in and by said sections provision is made by the said city for the imposition upon your orator of a charge of two dollars for each and every telegraph pole used or maintained by it in the streets or alleys of the city of Richmond, and also for the collection of the said fee of two dollars per annum for the maintenance of said poles and the prohibition of the maintenance of any poles except upon the payment of the said two dollars per annum per pole, which said sum of two dollars is excessive and beyond any legal charge that said city is entitled to impose upon your orator under the provisions of the Constitution of the United States and the Acts of Congress hereinbefore set forth. Your orator avers that the said sum of two dollars per pole per annum is enormously more than could be properly or legally charged as a rental for the space occupied by said poles, and far in excess of any expense said City of Richmond can properly incur in inspecting or supervising the poles, wires, or other appliances of your orator and that the said sum is enormously in excess of any amount that could be incident to the most careful, thorough, and efficient inspection of your orator's lines, wires, poles, cables and other appliances, together with the cost of all measures of reasonable precaution which can be required to be taken for the safety of the said City of Richmond and the public generally and far in excess of any sum expended by the said city for any and all of the above-named purposes.

That your orator pays to the said City of Richmond the same *ad valorem* and property tax for lines, poles, wires, cables, appliances, and property in said city which

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is imposed upon and paid by other corporations and citizens, and that in addition thereto your orator pays to the said city of Richmond the large sum of five hundred dollars per annum as a specific license tax, the said *ad valorem* and the said specific license tax paid thus by your orator to the said city of Richmond being the largest sum which could be properly and legally imposed upon your orator for all purposes, and your orator therefore avers that the said fee of two dollars for each and every telegraph pole imposed under the provisions of said Chapter 88 and specially provided for in sections 9, 10, 11, 12, and 13 of said chapter, are wholly illegal and void and beyond the powers of the said city of Richmond to impose. Furthermore, in and by said Section 12 said city requires your orator to remove forthwith from the streets of said city every pole upon which it has not paid the said exaction of two dollars, and by Section 13 of said Chapter 88, for failure to file with the city engineer a list of the poles and paying said fee of two dollars, your orator is exposed to a fine of not less than five nor more than one hundred dollars for each pole and each day of default in complying with the provisions of the previous sections is made a separate offense, and such fines are to be imposed by the police justice of said city of Richmond.

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ARTICLE XVII.

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Your orator avers that Section 15 of said Chapter 88 is unreasonable in that, while it provides for inspection by the chief of the fire department and the superintendent of the fire alarm and police telegraph, of all poles and wires upon the streets and properly provides when any pole or apparatus is unsuitable or unsafe that the same must be properly replaced, renewed, altered, or constructed, yet the said section seeks to bring your orator's business and appliances wholly under the control of the said officers by the provision in said

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section that any person or company failing to perform any requirement made of him or it by said chief of the fire department or said superintendent, under said section, no matter how unreasonable or arbitrary or destructive of the business or properties of your orator such requirement may be, that such failure to perform such requirement shall make your orator liable to a fine of not less than five nor more than one hundred dollars and each day's failure shall be a

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separate offense.

ARTICLE XVIII.

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Your orator avers that Section 16 of said Chapter 88 is in violation of your orator's right under the said Acts of Congress of July 24, 1866, in that, while your orator has the right, upon all the streets of the said city of Richmond, to construct and maintain telegraph lines, subject to reasonable regulations of the said city, said **Section 16 seeks to limit and qualify that right by permitting your orator to obtain additional routes for its wires when its business may demand the same, only when the committee of the said city council shall authorize such additional routes, subject to the conditions, restrictions, limitations and charges set forth in said Chapter 88.**

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ARTICLE XIX.

Your orator avers that by Section 25 of said Chapter 88, every pole of your orator and all wires and other apparatus thereafter erected in the streets or alleys of said City of Richmond are made subject to each and every provision of said Chapter 88, unless expressly provided otherwise. Your orator avers that its rights under the provisions of said Act of Congress are

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sought to be limited, qualified, or destroyed by the provisions of Section 25 of said Chapter 88, taken in connection with the provisions of the following section, in that, while, under the provisions of said Act of Congress, of July 24, 1866, your orator has the right to construct, maintain, and operate its telegraph lines along and upon the streets of said city, free from any condition, qualification, or control by the said City of Richmond, save lawful and reasonable police regulations, said Section 26 seeks to impose the obligation upon your orator to obey every restriction, provision, or condition imposed by said Chapter 88, and also every requirement made under said chapter by the city engineer, the superintendent of the fire alarm and police telegraph department, or the chief of the fire department, and this section provides that every requirement made by the said officers of said city, as to which there is not in other sections of said Chapter 88 a fine specially imposed, exposes your orator to a fine of not less than ten nor more than five hundred dollars to be imposed by the police justice of the said city, and each day's failure to comply with such requirement is deemed a separate offense, with no right of appeal to any other power or authority, no matter how unreasonable the requirements of the said City Engineer, the Superintendent of the Fire Alarm, and Police Telegraph Department or the chief of the fire department may be.

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ARTICLE XX.

Your orator avers that Sections 27 and 28 of said Chapter 88, as amended, are wholly unreasonable and void, as applied to your orator, in that said sections seek to subject your orator's property and business within certain territory defined as the "underground" territory, wholly to the discretion and control of the said city, acting through a committee or the officers of said city. Said Section 27 defines certain territory as being

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the "underground" territory, and seeks to impose upon your orator the obligation, within said territory, within a certain time, in accordance with the provisions of said Chapter 88 and subject to all its requirements, to place all wires of your orator within underground conduits, subject to a penalty of not less than one hundred nor more than five hundred dollars for each pole remaining after a certain date not placed in such conduit, such fine to be imposed by the police

78

justice and for every week of failure or neglect, after the imposition of the fine above named, your orator is sought to be made liable to a fine of not less than one hundred nor more than five hundred dollars, to be imposed as above stated.

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Your orator avers that the terms and conditions of placing said wires underground are unreasonable and void, for the reason that, under the provisions of Section 28 of said Chapter, your orator is required, before having any right to take a step towards placing its said wires underground, to submit to the Committee on Streets and Shockoe Creek, maps, plans, and details, showing the location, plan, size, construction and material of such conduits. Such plans are subject to alteration and amendment by the said committee, and when approved by the committee it is made the duty of your orator to proceed with the construction of such conduits, in accordance with the plans approved by the said committee. Your orator

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avers that there is thus vested in the said committee the final power to determine the character and mode of construction of such conduits, which can be seriously detrimental to the interests of your orator, and your orator is required to proceed with the construction of such conduits in accordance not with the judgment of its own officers as to the kind of conduit best suited to its business, but on the plan selected by said Committee, and in a manner satisfactory to the City Engineer. And said Section 27, as amended, also illegally provides that "any overhead wires hereafter installed within the said underground

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district shall be installed subject to the provisions of this ordinance."

Said Section 28 further imposes unreasonable burdens in connection with the construction of such conduits, in that it requires your orator not only to properly replace the pavement of the streets and alleys where such conduits are constructed but also imposes the obligation upon your orator to keep the pavement of such streets and alleys in proper repair, to the satisfaction of the City Engineer.

82

Whether said section should be construed as requiring your orator to replace the pavement of such streets and alleys in the part where such conduit is laid and bring the same back to its original condition of repair, so far as practicable, and then to keep such part of the pavement of such streets and alleys in proper repair, to the satisfaction of the city engineer; or whether it means keeping the pavement of the entire street in repair, is left unsettled by the language of said section; but either requirement imposes an unreasonable burden upon your orator. There is added thereto the further obligation that the city shall be saved harmless from any and all damages arising from laying such conduits.

83

Said section 28, as amended, is further unreasonable and illegal in that it requires your orator to construct a conduit of sufficient capacity to accommodate the wires in such streets and alleys and to provide for an increase thereof to at least the extent of thirty per cent. Whether said requirement in said Section 28 means all wires in said streets and alleys of your orator and of all other persons owning or using electric wires upon said streets and alleys or only the wires owned or used by your orator, is left uncertain by the terms of said section; but your orator avers that it is open to said city or its officials to insist that the meaning of said section is that your orator is required to provide conduits to a capacity sufficient not only to accommodate its own wires, but also all the other wires maintained or operated upon such streets or alleys; but

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whether the requirement of said section is that your orator shall provide conduits of sufficient capacity to accommodate all the wires in such streets and alleys or only to accommodate its own wires upon such streets and alleys, said requirement is unreasonable in either event for the reason that your orator is required by the terms of said section to invest a large amount of capital in the construction of such conduit beyond the amount required by it for its purposes, being required to make

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such investment of capital in conduits to the extent of at least thirty per cent. beyond all requirements for its own wires; that said investment in conduits cannot be used by your orator for its own purposes without the consent of the Committee on Streets and Shockoe Creek of said city; that such additional expense is required to be made by your orator, although such increase may never be used by any other person or company and the capital so invested may remain idle, without any compensation or return therefor to your

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orator; that said conduits thus required to be provided by your orator are placed wholly subject to the control of the Committee on Streets and Shockoe Creek of said City of Richmond, who may grant to any other person or corporation now having wires in said streets and alleys, or who may hereafter desire to run wires therein, the permission to occupy the same, upon such terms as may be agreed upon with your orator or determined by arbitration, as provided in and by Section 30 of said Chapter 99.

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Said Section 28 is further oppressive, burdensome, and illegal, in that it provides that the wires of the City shall be carried in such conduits free of charge and at least one duct shall be reserved for such wires. Your orator's business is further subjected to the control of the said Committee on Streets and Shockoe Creek, a committee of the council of the said City of Richmond, in that it reserves to itself by said section 28, the right to control the occupancy of the increased space in said conduits which your orator is required to construct and which

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it is not permitted to occupy for its own business, by granting the privilege to occupy the same to any other person or corporation now having its wires in said streets or hereafter desiring to run wires therein, regardless of the business of said other person, and no matter how objectionable the same person may be to your orator and no matter what reasons should obtain why the said other person should not be permitted to occupy the same conduit with your orator.

90

By said Section 28, the said city engineer is further given the control over the entire construction of said conduit, in that the said section requires the location, the size, the shape, the subdivision of such conduits, the material of which they shall be made and the manner of construction, to be satisfactory to the said City Engineer, and said section affords to your orator no appeal or relief from any requirement of said Engineer in any of said particulars. Your orator avers

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that conduits suitable for the business of your orator and adapted for the proper protection of wires in the business of telegraphing, can be constructed much more cheaply and do not require manholes at as frequent intervals as conduits constructed for the business of many other companies employing electrical conductors; but by the terms of said Section 28, your orator may be required to conform its conduits to the wishes of the said city officials with respect to the possible occupation of the said conduits by said other companies, and your orator is not permitted to adopt the plans best suited, in the opinion

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of its officials for its business, and the proper conduct of the same. By said Section 28, not only is your orator subjected to the control of the said city engineer, but it is also subjected to the control of the superintendent of Fire Alarm and Police Telegraph, in that the said section requires the work of laying underground conduits, tubes, electrical conductors, cables, and wires to be also under the direction of and satisfactory to the superintendent of Fire Alarm and Police Telegraph, and gives to said superintendent at all times

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free and unobstructed access to the conduits, tubes, pipes, electrical conductors and cables, for the purpose of inspecting the same or making connection therewith for conduit wires or conductors in use or to be used by the city. Your orator submits that such supervision is thus given to two of said city officials whose directions may be antagonistic and that by the provisions of section 26 of said Chapter 88, the failure of your orator to comply with the requirements of either of these officials exposes, your orator to a fine of not less than ten nor more than \$500, and each day's failure to obey such requirement is made a separate offense.

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ARTICLE XXI.

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Your orator avers that under Section 29 of said Chapter 88 there is imposed the requirement, contrary to the rights of your orator under the said Act of Congress, that whenever any wire or cable in said conduit shall come out of said conduit for the purpose of being run overhead upon poles, all precautions which may from time to time be required by the Committee on Streets and Shockoe Creek shall be taken for the protection and safety of persons and property, no matter how unreasonable said requirements may be and without defining what said precautions shall be.

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ARTICLE XXII.

Your orator avers that the provisions of Section 28 compel your orator to construct conduits to a capacity beyond its requirements, and by Section 30 of said Chapter 88 it is required to submit to the use of said conduits thus constructed by it by any person obtaining permission from the city council, regardless of any objections which your orator may have to the occupation by said person or company of the conduits and that under the provisions of said Section 30, if your

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orator refuses arbitration, the appointee of the city engineer is practically made the final arbitrator to determine the terms and conditions of such occupancy by such other party, and by said Section 30 your orator is compelled to abide by the terms and conditions settled by the said appointee subject to a fine of not less than fifty nor more than five hundred dollars for such failure, each failure to be a separate offense; and your orator is required to allow any person or company desiring to enter upon and use said conduit to so enter and use the same upon such terms and conditions so prescribed; and your orator is further subjected under said section to a penalty of not less than fifty nor more than five hundred dollars, each day's failure to be a separate offense, for failure to comply with the requirements imposed by the section and after notification thereof by the city engineer.

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ARTICLE XXIII.

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Your orator avers that Section 31 of said Chapter 88 seeks to destroy the rights and privileges given by the said Act of Congress of July 24, 1866, in that, while said Act of Congress gives the unlimited right to your orator to construct, maintain and operate telegraph lines over and along said streets of the City of Richmond, subject only to reasonable police regulations of said city, said Section 31 seeks to limit the privilege of building and owning conduits within said streets and the maintenance of electric wires therein to the term of fifteen years, and the said city seeks to reserve to itself, contrary to the terms of the said Act of Congress, the right to put such restrictions, conditions, and charges as it may see fit upon the privilege of building or owning conduits within said streets, at the end of the said term of fifteen years, and also seeks to reserve to itself the right to order the complete removal from said streets of the conduits constructed by your orator

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under the terms and conditions of said Chapter 88 and thereby to end all rights therein of your orator.

ARTICLE XXIV.

Your orator avers that, under the provisions of said Section 32 of said Chapter 88, the said city, in violation of the provisions of the Act of Congress, seeks to im-
102 pose a charge upon your orator for the privilege of using and occupying the streets of said city, with its conduits, whereas the provisions of the said Act of Congress give to your orator the right, free of any imposition or charge of said city, to occupy the said streets, upon compliance with the reasonable police regulations of a city, and under the provisions of the said Section 32, said city, until January 1st, 1900, seeks to require as a payment
103 for the use of the privilege of occupying the streets of the city, the sum of two dollars per mile per wire per annum for every wire owned or used by your orator, and the said City of Richmond further seeks to reserve to itself the right, after January 1st, 1900, to charge such larger compensation as it may see fit for the rest of the period of fifteen years, during which, by said Chapter 88, it pretends to grant the privilege of using and occupying the streets of the city.

Your orator avers that, under Section 32 of said Chapter 88, such charge of two dollars per mile per
104 wire per annum is imposed upon every person, either owning or using the wire, as a compensation for the privilege of using and occupying the streets of the city, and that said charge of two dollars per mile per wire per annum is far in excess of any sum that said city is entitled to charge upon the basis of rental for the space occupied by said conduits; that the wires in said conduits would require no expenditure of money on the part of said city for inspection and that the said charge of two dollars per mile per wire is simply a sum sought to be exacted by the said city of your

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orator for the privilege of maintaining under the streets of said city conduits, which would in no way interfere with the said streets, and would in no way impose any expenditure of money upon said city contrary to the provisions of the said Act of Congress of July 24, 1866.

ARTICLE XXV.

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In and by the provisions of Section 33 of said ordinance, said City Council seeks to reserve to itself the right to require that the conduits in and by said ordinance provided for shall be extended from time to time whenever required by the City Council and to include the streets or alleys upon which said council may determine from time to time that no overhead wires shall be run, thereby seeking to reserve to said City Council the right, within the entire corporate limits of the City of Richmond, to prohibit the construction, main- 107
tenance or operation upon the streets and alleys of any overhead wires, although the defendant City of Richmond covers a large territory within large portions of which the requirements to maintain wires underground would be unreasonable, and would subject your orator to very great and unreasonable expense, with no advantage to the public, and within what would be largely territory not built upon and unoccupied, and where such requirements would in effect prohibit the use of such streets and alleys by your orator, contrary to the 108
provisions of said Act of Congress of July 24, 1866.

ARTICLE XXVI.

Your orator alleges that it can take no steps under Sections 27 and 28 with respect to underground conduits, save and except by first filing plans with the Committee on Streets and Shockoe Creek and it is advised that by filing the plans of the proposed conduits

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under Section 28 of said chapter, it might be construed as acceding to all the provisions of said Chapter 88, including the reservations of Sections 8, 31, 32 and 33, and all reservations of the City of Richmond or its council in said Chapter 88 of the right to impose new terms and conditions upon the privilege, if such it be, of placing its wires in conduits within the underground territory of the City of Richmond, and that the action of your orator in thus filing plans for the proposed

110 conduits and acceding to the provisions of said Chapter 88, might be construed as a surrender of its rights under the Acts of Congress of July 24, 1866, and under the Constitution and laws of the United States, and consenting to subject itself to the control of said city as defined in and by all the provisions of the various sections of said Chapter 88.

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Your orator is further advised that the said City of Richmond makes the claim that such filing of plans by your orator would be a waiver of all its rights under the said Act of Congress of July 24, 1866, and would subject your orator to any future ordinances which the said city might enact, and also to further taxes, charges, conditions and restrictions imposed by said city.

112

Your orator says further that it recognizes the right of the said city to impose reasonable regulations for the construction, maintenance and operation of telegraph lines within said city, and in recognition of said right your orator has, within the territory set forth or described in Section 27 of said Chapter 88, offered

112 to the proper committee of the council of said city, and hereby repeats said offer, to place its wires underground within said territory, if said city will waive the illegal and unconstitutional requirements of said Chapter 88 hereinbefore set forth, but your orator avers that said City of Richmond refuses to modify the said Chapter 88 by the removal therefrom of said illegal requirements or to make express reservation and preservation of the rights of your orator under the said Act of Congress of July 24, 1866, and your orator therefore avers that the purpose of the said City of Rich-

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mond, in enacting said Chapter 88, and insisting upon the enforcement of the same as against your orator, and in seeking to compel your orator to act under said ordinance, without any express reservation saving your orator's rights under the Act of Congress of July 24, 1866, is to put itself in a position to claim and assert against your orator that your orator has waived all its rights and privileges under the Act of Congress of July 24th, 1866.

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ARTICLE XXVII.

Your orator says, that, under the amendment to said Section 28 of said Chapter 88, approved December 18, 1903, your orator was required to remove all of its poles, wires, cables, and other appliances for conducting electricity from the streets and alleys of the defendant within the district mentioned in said Section 27, within six months from the approval of said amendment to said Section 28, and the time so fixed having expired and your orator not having complied with said requirements of the defendant, your orator has been threatened by the defendant, through its attorney, and believes and charges that the defendant, through its said attorney, intends to proceed against it forthwith for all the penalties imposed subsequent to June 18, 1904, by said Chapter 88 and the various sections thereof, and to insist upon the enforcement and recovery of said fines for each and every day of the failure of your orator to comply with the requirements of said Chapter 88, and your orator charges and believes that it is the purpose of the defendant to use said penal features of said Chapter 88 as a means of requiring and compelling the removal of your orator's poles, wires, cables, and other appliances for the conduct of its aforesaid business from said underground territory described in said Section 27 as amended and compelling your orator to act under the said Section 28 as amended, and thereby to become

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subject to all the terms, conditions and requirements of said Chapter 88.

ARTICLE XXVIII.

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Your orator avers that the said charge of two dollars per pole, provided in Section 10 of said ordinance, and the said charge of two dollars per pole and of two dollars per wire per mile per annum, provided to be paid to said City of Richmond in and by Sections 10 and 32 of said ordinance, are each excessive and illegal impositions, and beyond any legal charge that the said city is entitled to impose upon your orator as compensation for the space occupied by said poles, or for space occupied by said conduits underneath the surface of the streets, and far more than can be properly, or legally charged as a rental for the space occupied by said poles, or for said conduits, together with all the expenses that the said City of Richmond can be at in the way of inspection or supervision of said poles, or of the said conduits, and your orator's appliances therein, and that the same are therefore exactions imposed by the said ordinance contrary to the provisions of the said Act of Congress of July 24, 1866, for the privilege of using and occupying the streets of the said City of Richmond.

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ARTICLE XXIX.

Your orator says further that said Chapter 88 and all the sections thereof form one connected piece of legislation by said city for the government control and regulation of wires, poles, and conduits of companies owning, operating and maintaining electric wires, in, over, and under the streets of the said City of Richmond, and that it is not practicable to separate one section of said ordinance from the rest thereof, but that the various sections thereof are interdependent and interrelated with each other.

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Your orator further says that it is without remedy save in a court of equity and that it will be subjected to a multiplicity of suits for the prosecution of penalties under said ordinances and be subject to irreparable loss and injury, unless this Honorable Court shall, by its writs of injunction, enjoin and restrain the defendant from enforcing the aforesaid ordinance, and each and every section thereof, and from enforcing the penal features thereof, and unless this Honorable Court shall declare and decree that said ordinances, 122 and the various sections thereof, and especially those hereinbefore particularly enumerated, to be unreasonable, illegal, and null and void.

Your orator further submits and insists that said ordinance, chapter 88, and each and every section thereof and all amendments thereto, and especially sections 1, 2, 4, 5, 6, 8, 9, 10, 11, 12, 13, 25, 26, 27, 28, 30, 31, 32, and 33 thereof, and the amendments to said sections 27 and 28 are grossly unreasonable and illegal, and repugnant to the aforesaid provisions of the Con- 123 stitution of the United States and Amendments thereto, and the aforesaid acts of Congress, and should therefore be declared and decreed by this honorable court to be null and void.

In tender consideration whereof, and because your orator is otherwise remediless in the premises, he prays that the City of Richmond may be made a party defendant to this bill and required to answer the allegations thereof, but answer under oath is hereby expressly waived; that the said City of Richmond, its at- 124 torneys, agents and servants, and all others acting by, through or under its authority, may be permanently and perpetually enjoined and restrained from enforcing, or attempting to enforce, against your orator the provisions and requirements of said chapter 88 of Richmond City Code, 1899, and from enforcing, or attempting to enforce, against your orator the provisions and requirements of any or either of the various sections of said chapter 88, and from enforcing, or attempting to enforce, against your orator the aforesaid amendments

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to sections 27 and 28 of said chapter 88, and from enforcing, or attempting to enforce, against your orator the provisions of any amendment to said chapter 88, and from enforcing, or attempting to enforce, against your orator the penal features of said chapter 88, and amendments thereto, and from enforcing, or attempting to enforce, against your orator the fines and penalties, or any or either of them, imposed by said chapter 88, and amendments

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thereto, and from removing or attempting to remove, from the streets and alleys of the defendant the poles, wires, cables, and other appliances of your orator, or any or either of them, and from, in any manner or to any extent, interfering with your orator or its property, and from, in any manner or to any extent, obstructing the business of your orator; that said chapter 88, and each and every section thereof, and all amendments thereto, and especially sections 1, 2, 4, 5, 6, 8, 9, 10, 11, 12, 13, 25, 26, 27, 28, 30, 31, 32, and 33, and the

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amendments to said sections 27 and 28, may be declared and decreed to be wholly unreasonable and illegal and null and void, and that your orator may have such other and further and general and complete relief as the nature of its case may require and to equity may seem meet.

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Your orator also prays that pending the hearing of the application for an injunction, and pending the granting of a permanent and perpetual injunction in the premises, the court may issue a temporary restraining order prohibiting each, all, and every of the proceedings, matters and things as to which your orator hereinabove prays for a permanent and perpetual injunction, until the motion and application for an injunction can be heard and until a permanent and perpetual injunction shall be granted, as hereinabove prayed.

May it please your honors to grant unto your orators the writ of subpœna of the United States of America, to be directed to the defendant, the City of Richmond, a corporation incorporated and existing under the

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laws of the State of Virginia, commanding it by a certain day and under a certain penalty, to be and appear before your honors in this honorable court then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular the premises and to stand and abide and perform such order and decree therein as to your honors shall seem agreeable to equity and good conscience.

THE WESTERN UNION TELEGRAPH COMPANY,

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By

Solicitors and Counsel for the Complainant.

UNITED STATES OF AMERICA, }
Southern District of New York. } ss.

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On this day of March, 1905, before me, in the city of New York, and within the Southern District thereof, personally appeared

of the Western Union Telegraph Company, complainant in the above-entitled action, who made oath that he has read the foregoing bill of complaint and knows the contents thereof and that the statements therein, so far as made upon his own knowledge, are true, and that he believes the statements of said bill to be true, so far as stated upon information and belief.

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Sworn to before me this }
day of March, 1905. }

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Exhibit No. 1, with Complainant's Bill.**CHAPTER LXXXVIII.****CONCERNING WIRES, POLES, CONDUITS, ETC., IN, OVER
AND UNDER THE STREETS.**

1. Hereafter no pole shall be erected, nor any wire
134 or other apparatus, used in connection with the transmission of electricity, be placed in position, in any street or alley of this city, until the City Engineer shall have first determined upon the size, quality, character, number, location, condition, appearance, and manner of erection, of such poles, wires or other apparatus. Whenever at any time the said poles, wires, or other apparatus, shall, in the opinion of the City Engineer, need changing in size or location, replacing, repairing, being made safe and secure, or being put in proper and suitable condition and appearance, such one of the persons,
135 so using the same (if there be more than one, as shall be selected by the City Engineer) shall immediately proceed to do such changing as to size and location, replacing, repairing, making safe and secure, or putting in proper and suitable condition and appearance, as the said engineer shall designate in writing, and all damage done to any street, by the erection of any pole, shall, from time to time, be rectified and repaired, as required by the City Engineer. All expenses arising from any
136 materials furnished or work done under this section, shall be borne in such proportion by all persons using such poles, wires or other apparatus as the City Engineer may deem fair ; unless the parties can agree upon satisfactory terms within ten days from the time such changes or repairs shall have been completed.

2. That all poles now erected in the streets or alleys of the city of Richmond for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances to be removed and run in conduits, shall here-

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after be allowed to remain only upon the terms and conditions hereinafter set forth.

3. No pole now erected for the support of telephone wires shall remain on any street in said city after the 15th (fifteenth) day of December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes, in accordance with the provisions of this ordinance, and such other conditions as the Council may see fit to impose. And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such pole or poles and telephone wires supported thereon, from the streets or alleys of the city, by the twentieth day of December, 1895, and restore the street to a condition similar to the rest of the street, or alley contiguous thereto, the said owner shall be liable to a fine of not less than five, nor more than one hundred dollars, for every such pole so remaining in the street or alley, to be imposed by the Police Justice of the city; each day's failure to be a separate offense. 138

4. The Committee on Streets may hereafter require any person or company owning any such poles, used for telephone or telegraph purposes, to allow any other person or company to place upon its pole and in such positions thereon any telegraph, telephone, or any other light current wire which may be used for the transmission of electricity, now belonging to, or that may hereafter belong to, any person or company authorized by the Council to run wires in the streets or alleys, as the committee may from time to time deem proper, and which will not, in the opinion of said committee, unreasonably interfere with the business of the person or company owning such poles, and upon such terms and conditions as may be agreed upon by said owner and any person or company desiring to use such poles; and in the event that said owner and the person or company desiring to use said poles cannot agree upon satisfactory terms and conditions, the same 140

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shall be settled by three disinterested persons, one to be selected by such owner, one by the person or company desiring the use of said poles, and the third by the two persons so selected ; and the terms and conditions which shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which said company or companies, respectively, shall use and occupy said poles. If the said owner

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writing to appoint its representative, fail to make such appointment, then the City Engineer shall make such appointment, and the person so appointed shall have the powers he would have had if he had been appointed by the said company. If the two arbitrators, selected in either of the two manners above specified, shall fail for thirty days after their appointment to select a third arbitrator, then the City Engineer shall select such third arbitrator, and when so selected, he shall have the same powers he would have had if he

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had been appointed by the two said arbitrators. Or, if after the three arbitrators shall have been appointed in any of the modes above specified, they shall fail to settle and determine said terms and conditions within thirty days from the date of the appointment of said third arbitrator, then the City Engineer shall have power to select a person who shall have power to settle and determine said terms and conditions. Should either the said owner, or any person or company that may, under this section, enter upon and use the poles of said

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owner, fail to keep and perform each and every one of the terms as to the use of said poles, the company so failing shall be liable to a fine of not less than ten nor more than one hundred dollars for such failure ; each day's failure to be a separate offense. The said committee shall have the power to require said owner to allow any person or company desiring to enter upon and use said poles to so enter and use the same, under such conditions as the City Engineer may prescribe, as soon as the said person or company so desiring to enter shall have appointed its arbitrator ; but the person or com-

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pany so entering shall do so under contract and bond that he or it will abide by and conform to the terms and conditions determined upon by the arbitrator, as soon as such decision shall be announced. And the said committee shall have the power, also, to require from time to time the said owner, or any other person or company using said poles, to afford and furnish such protection or protections to all wires on such poles as the said committee may deem proper or necessary in order to allow such wires to perform the purposes or functions for which they were intended. All work as to placing of wires now upon the poles of any other company shall be done at the cost and expense of the party desiring to use such poles. Each and every one of the above stated provisions shall respectfully apply to poles now carrying electric light, electric power, and electric car wires, to the extent of entitling any person or company authorized by the Council to run wires over the streets and alleys, and authorized by said committee, in accordance with the terms of this ordinance, to place on any such pole any electric light, electric power, electric power wire, or other heavy current wires, which may be used for the transmission of electricity. For any failure to perform any requirement ordered under this section within ten days being notified of such requirement, by the City Engineer, each party so in default shall be liable to a fine of not less than fifty nor more than five hundred dollars; each day's failure to be a separate offense.

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5. Hereafter no pole shall be erected until the City Engineer shall have first determined upon the size, quality, character, number, location, condition, appearance and manner of erection of such pole.

6. Each and every permission herein given is granted upon the condition that the city shall have the right by and through the Board of Fire Commissioners to run all wires needed for the fire alarm and police telegraph department on all poles erected, or allowed under this ordinance to remain on any street or alley of the city, and in such positions on said

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poles as shall seem proper to the superintendent of said department. Whenever any permission has been granted by the Council or Street Committee to any person or corporation to erect any pole or poles for the support of wires used for the transmission of electricity, it shall be the duty of such person or corporation, before erecting any such pole or poles, to submit to the Board of Fire Commissioners a diagram showing the proposed location of such poles, and arrangement of poles and wires, so as to enable said superintendent to select and require to be reserved such positions on any such pole or poles as he may deem proper and necessary.

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7. No person or company shall use the pole, wires, or other apparatus above referred to, of any other person or company until he or it shall have filed with the City Engineer a written application fully setting forth what poles or other apparatus he or it shall desire to use, nor until receiving from said Engineer a written notification so that the said committee has given the applicant permission to so use the same in accordance with the provisions of this ordinance.

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8. The City Council hereby reserves the right to put at any time other restrictions and regulations as to the erection and use of said poles, wires, and other apparatus used in connection with the transmission of electricity, and from time to time require such poles as it may deem proper to be removed, and the wires thereon to be run in conduits, upon such terms as the city may deem proper.

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9. All persons and corporations having, using, or maintaining any telegraph, telephone, electric light or other poles in any of the parks, streets, lanes or alleys of the city of Richmond, shall annually, between the fifteenth day of December and the first day of January in each and every year, file with the City Engineer a list of all such poles so used, possessed or maintained by him or them, giving the accurate location of each of such poles, and the number and character of wires carried thereon, the names of the owners of said poles and of

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the persons using the same, and shall at all times keep stamped, painted, or printed thereon, in legible characters, their name as owner upon each of such poles. A copy of such list shall be furnished by said Engineer to the City Auditor, and to the Superintendent of Fire Alarm and Police Telegraph.

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10. Annually, between the first day of January and the fifteenth day of January, all persons or corporations shall pay to the City Treasurer, a fee of two dollars for each and every telegraph, telephone, electric light or other pole, used, possessed, or maintained by them in any of the parks, streets, lanes, or alleys of the city of Richmond, except trolley poles, used exclusively for stringing thereon wires for use in the propulsion, by electricity, of street passenger cars. Upon the receipt of the above fee by said Treasurer, the City Auditor shall deliver to the person or corporation paying the same, a tin plate, with a plain and conspicuous number thereon, to be provided in the manner prescribed in the next succeeding section, for each and every pole upon which the said license fee is paid, and shall also enter in a book, to be kept for that purpose, the name of the person or corporation to whom the license is issued, and the number of poles for which it is issued, and the number of tin plates delivered to the person paying such license fee; he shall also deliver to such person or corporation a certificate, under his own hand, that such person or corporation has paid the required license fee for that year on the specified number of poles, and has received the tin plates of the given numbers therefor; such person or corporation shall then have one of such tin plates securely fastened in some conspicuous place upon each of the poles used, possessed or maintained by it or him, as may be designated by said superintendent. 155

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11. It shall be the duty of the City Auditor, annually, on or before the fifteenth day of January in each and every year, to purchase a sufficient number of tin plates, numbered with plain, conspicuous figures, beginning with number 1, and so on progres-

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sively, to be furnished, as prescribed in the preceding section of this ordinance, to the persons or corporations using, possessing, or maintaining telegraph, telephone, electric light, or other poles other than trolley poles, used exclusively for stringing wires thereon, for use in the propulsion, by electricity, of street passenger cars ; the City Auditor shall cause to be stamped with the proper die or painted on each of such tin plates the year in which they are issued ; the

158 said plates to be of suitable size and description, in the discretion of the City Auditor.

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12. After the twentieth day of January, 1896, all telegraph, telephone, electric light and other poles in any of the streets, lanes and alleys of the city of Richmond (except trolley poles used exclusively for stringing thereon wires for use in the propulsion of street passenger cars), which shall not have been included in any list filed in accordance with the ninth section of this chapter, with the City Engineer, or upon which

the name of the owner is not legibly painted, printed or stamped, or upon which the above mentioned license fee has not been paid, or on which the above prescribed tin plate is not securely fastened in some conspicuous place, shall be forthwith removed by its owner.

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13. Any person, or persons, or corporation, using, possessing, or maintaining, any telegraph, telephone, electric light, or other poles, in any of the streets, lanes or alleys of the city of Richmond, who shall fail to file with the City Engineer the list as prescribed in section 9 of this chapter, or who shall fail to have stamped, printed or painted in legible characters his, or its name as owner upon each of such poles as prescribed in said section 9, by the twentieth of January of each and every year ; or who, if belonging to the classes required to pay a fee of two dollars on each pole by section 10, shall fail to pay the said fee, or shall fail to have the tin plate therein prescribed, securely fastened in some conspicuous place by the said twentieth day of January of each and every year, upon all

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such telegraph, telephone, electric light, or other poles so used, possessed and maintained by him or them, shall be liable to a fine of not less than five, nor more than one hundred dollars, for each pole upon which he, they or it, are so in default; and each day of default to be a separate offense. Such fines to be imposed by the Police Justice of Richmond.

14. It shall be the duty of the Chief of Police to require the police captains of each police district to report to him on the last Monday in November in each year that they have examined each pole in their respective districts used for the support of wires, carrying electricity, and whether any or all are in safe condition. The said Chief of Police shall, upon receipt of such report, forward the same to the Superintendent of Fire Alarm and Police Telegraph, who shall require the person or company owning any such pole reported to be unsafe, and deemed by the said superintendent to be unsafe, to remove the same. Any such person or company who, after being so notified, shall fail to have the same removed within forty-eight hours after being so notified, shall be liable to a fine of not less than ten, nor more than fifty dollars; each day's failure as to each pole so declared unsafe shall be a separate offense. 162

15. The Chief of the Fire Department and the Superintendent of Fire Alarm and Police Telegraph shall each have power, and it shall be their duty to examine and inspect, from time to time, all poles and every wire or cable over the streets, public grounds or buildings, when such wire is designated to carry an electric current; shall notify the person or corporation owning or using such poles, when any such pole is unsafe or owning or operating any such wire or cable with never its attachments, insulations, supports or appliances are unsuitable or unsafe, and that the said poles, wires or cables must be properly replaced, renewed, altered or constructed; and shall require the owner of any wire abandoned for use to remove the same. Any person or company failing to perform any requirement made of him or it by either the said Chief of Fire De- 164

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partment, or said Superintendent, under this section, shall be liable to a fine of not less than five nor more than one hundred dollars ; each day's failure to be a separate offense.

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16. Any person or corporation who now has permission from the City Council to run wires over the streets or alleys in the city, or may hereafter obtain such permission, may obtain additional routes for its wires when his or its business shall demand the same, and when the said committee shall authorize such additional routes subject to the conditions, restrictions, limitations, and charges herein set forth.

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17. All wires shall be fastened upon poles or other fixtures with glass, porcelain, or rubber insulators approved by the Superintendent of the Fire Alarm and Police Telegraph, and must be stretched tightly and fastened with a tie of the same kind of wire. No wire shall be stretched within four inches of any pole, building, or other object, without being attached to it and insulated therefrom. All wires strung on house tops must be at least nine feet clear of the roof.

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18. No wire shall be within 25 feet of the pavement at the lowest point of sag between supports except where required to reach a lamp or other connection, and must then be protected by extra covering and rigidly fixed and out of the way. No wire shall be run within eighteen inches of a city wire. No tree shall be cut or disturbed without consent of the City Engineer.

19. All electric light and power conductors, except trolley wires, shall be secured to insulated fastenings, and covered with an insulation which is water proof on the outside and not easily worn by abrasion. Whenever the insulation becomes impaired it must be renewed immediately. All joints must be as well insulated as a conductor, and the insulation of joints must be maintained.

20. Every wire or cable must be distinguished by a number plainly marked on each cross arm under the insulator. Day circuits must be conspicuously desig-

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nated. All arc lamps must be so placed as to leave a space underneath of at least nine feet clear between lamp and sidewalk. Every line for arc light or power entering a building shall be controlled by a cut-off placed near the entrance, in sight and easily accessible.

21. In the construction of lines the insulation to be used must be approved by the Superintendent of Fire-Alarm and Police Telegraph in writing, filed with the Board of Fire Commissioners, and the insulation resistance must be maintained in accordance with the standard, and is to be not less than three megohms per mile per 100 volts. And under no circumstances shall underwriters' wire be used. 170

22. All connections with lines of electric light or power conductors shall be made at right angles to the same; and connections to buildings shall be straight across to the building and then down the front of the building. The insulation must be preserved throughout the entire circuit, and if any portion of a lamp or fixture is a part of a circuit and can be touched, it must be insulated. All conductors shall have a resistance uniformly distributed of not more than 30 ohm per mile per ampere, and proportionately less for heavier currents. 171

23. All circuits for electric light or power must be tested every hour, and when a ground comes an effort must be made to remove it at once. Failing in this, the circuit must be discontinued until the insulation is restored. No unused loops from electric light circuits shall be allowed to remain after lamps have been taken away, except in cases where it is positively known that the lamp would be required again within three months, and where there is no underground current for that class of circuits. When allowed to remain the joint in the loop must be as well insulated as the line itself. 172

24. Nothing in this chapter is intended to relieve any person or company of any condition, restriction or requirement imposed upon said person or company by the ordinance in which it has been authorized to place

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in the streets or alleys any poles, wires or other apparatus for the transmission of electricity.

25. Each and every provision of this ordinance, unless otherwise provided, shall apply to any pole, wire or other apparatus used in connection with the transmission of electricity, hereafter erected in the streets or alleys, whether the same be erected by the way of repairs or for additional routes, or for any other purpose.

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26. Any person violating any restriction, provision or condition imposed by this chapter, or failing to perform any requirement, made under this chapter by the City Engineer, the Superintendent of Fire Alarm and Police Telegraph Department, or Chief of the Fire Department, as to which there is not in this chapter a fine specifically imposed, shall be liable to a fine of not less than ten, nor more than five hundred dollars, to be imposed by the Police Justice of said city; each day's violation, or failure, to be a separate offense.

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27. The telegraph, telephone and electric light and power wires and cables, including feed (but excluding trolley wires), and all other appliances for conducting electricity, and the poles therefor heretofore and now being in any street, alley or public ground of the city, are hereby ordered to be removed from the following named streets, to-wit: On Broad street from the western side of Adams street to the east side of Eleventh street; on Bank street from the western side of Ninth street to the eastern side of Twelfth street; on Main and Cary streets from western side of Seventh street to eastern side

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of Fourteenth street; on Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth streets from the northern side of Broad street to southern side of Cary street, within twelve months from the fifteenth day of June, 1896. Any company, corporation, partnership or individual owning or controlling any such overhead wires, cables or appliances or poles, that refuses, neglects or fails to remove them from overhead, within the time as hereinbefore provided, shall be liable to a fine of not less than \$100 or more than \$500, for each pole so remain-

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ing, to be imposed by the Police Justice of the city of Richmond; and for every week of continued failure and neglect to so remove them after the imposition of the fine above mentioned, such company, corporation, partnership or individual shall be liable to a fine of not less than \$100 nor more than \$500, to be imposed as above stated.

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28. The City Council will grant permission to any company, corporation, partnership or individual to place its wires and electrical conductors in conduits under the surface of the streets of the city; any such individual, partnership, corporation or company desiring such permission shall petition to the Council therefor; such petition shall name the streets, alleys and the side and portions thereof to be used and occupied by such conduits, and shall submit maps, plans and details thereof to accompany such petition. Such permission shall be granted by the City Council under the conditions that the petitioner shall furnish a bond to the city to be approved by the Mayor, and in the penalty to be prescribed by such permission; that the pavement of the streets and alleys wherein such conduits are laid shall be properly replaced and shall be kept in proper repair, to the satisfaction of the City Engineer, and that the city shall be saved harmless from any and all damages arising from laying such conduits; that such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys and to provide for an increase thereof to at least the extent of 100 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership, or individual, directly or indirectly, without the consent of the City Council; that the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires; after obtaining the consent of the City Council any other person or corporation now having wires in the streets, or hereafter desiring to run wires therein, may occupy proper and necessary portions of such conduits upon such terms as may be agreed upon with the petitioner,

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and in case of a disagreement, upon terms to be determined by arbitration as herewith provided; any such company, corporation, partnership or individual so placing its wires underground in any street, alley, or public ground of said city, shall, upon notice from the city or any of its departments that a local improvement or gas, sewer, or water main, or branch thereof, is to be constructed or repaired in such manner as will necessitate the moving

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or altering of its conduit or conduits, or their appurtenances, of said individual, partnership, company or corporation, move or alter the same at its own expense, so as to permit the construction or the improvement where ordered, and should any company or corporation omit to comply with such notice, the conduit or conduits, or their appurtenances, may be altered or removed by the city and the cost and expense thereof recovered from such individual, company or corporation. Manholes shall at all times conform to the

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grades of the streets. The location, size, shape, and subdivision of such conduits, and the material of which they shall be made, and manner of construction, shall be satisfactory to the Committee on Streets. The work of laying underground conduits, tubes, pipes, electrical conductors, cables and wires, shall be under the direction and to the satisfaction of the Superintendent of Fire Alarm and Police Telegraph, who at all times shall have free and unobstructed access to the conduits, tubes, pipes, electrical conductors or

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cables, for the purpose of inspecting the same, or making connections therewith, for conduit wires or conductors, in use or to be used by the city.

29. Whenever any wire or cable run in such conduit shall come out of such conduit for the purpose of being continued and run over-head upon poles, all precautions which may be required from time to time by the Committee on Streets, shall be taken for the protection and safety of all persons and property.

30. The terms upon which any person or company, after obtaining permission from the City Council may

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enter with its wires and use such conduits shall be as follows : In the event that said owner and the person or company desiring to use said conduit cannot agree upon satisfactory terms and conditions the same shall be settled by three disinterested persons, one to be selected by such owner, one by the person or company desiring the use of said conduits, and the third by the two persons so selected ; and the terms and conditions which shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which said company or companies respectively, shall use and occupy said conduit. If the said owner shall, for thirty days after having been requested in writing to appoint its representative, fail to make such appointment, then the City Engineer shall make such appointment, and the person so appointed shall have the powers he would have had if he had been appointed by the said company. If the two arbitrators, selected in either of the two manners above specified, shall fail for thirty days after their appointment to select a third arbitrator, then the City Engineer shall select such third arbitrator, and when so selected he shall have the powers he would have had if he had been appointed by the two said arbitrators. Or if after the three arbitrators shall have been appointed in any of the modes above specified, they shall fail to settle and determine said terms and conditions within thirty days from the date of the appointment of said third arbitrator, then the City Engineer shall have the power to select a person who shall have the power to settle and determine said terms and conditions. Should either the said owner or any person or company that may, under this section, enter upon and use the conduit of the said owner, fail to keep and perform each and every one of the terms as to the use of said conduit, the company or person so failing shall be liable to a fine of not less than fifty, nor more than five hundred dollars for such failure ; each failure to be a separate offense. The said committee shall have the power to require said owner to allow any person or com-

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pany desiring to enter upon and use said conduit to so enter and use the same under such conditions as the City Engineer may prescribe, as soon as the said person or company so desiring to enter shall have appointed its arbitrator; but the person or company so desiring to enter shall do so under contract and bond that he or it will abide by and conform to the terms and conditions determined upon by the arbitrators, as soon as such decision shall be announced. And the said committee shall have power also to require from time to time the said owner, or any other person or company using said conduit, to afford and furnish such protection or protections to all wires in such conduit as the committee may deem proper and necessary in order to allow such wires to perform the purposes or functions for which they were intended. For any failure to perform any requirements under this section, within ten days after being notified of such requirement by the City Engineer, each party so in default shall be liable to a fine of not less than fifty, nor more than five hundred dollars; each day's failure to be a separate offense.

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31. No privilege as to the building and owning of said conduits shall last longer than fifteen years, at the expiration of which time the city may put such restrictions, conditions and charges as it may see fit, and shall be lawful, or may order its removal at the expense of the owner.

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32. For the privilege of using and occupying the streets of the city, as herein proposed, each person or corporation owning or using any wire or wires run in such conduit shall each year, until January, 1, 1900, pay to the city treasurer a sum equal to \$2 per wire, per mile, so owned or used by said person or company. On and after January 1, 1900, the City Council reserves the right to charge such larger compensation for the rest of the term of the privilege as it may see fit. Each person or corporation shall, on the fifteenth day of June and January of each year, pay to the city auditor a sum equal to \$1 per wire, per mile, then

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owned or used by such person or corporation, and shall render to the auditor a sworn statement as to the number and length of each of the wires then owned or used by him or it. The Committee on Finance may, when it may see fit, have the books of the person or corporation rendering such statement examined by a bookkeeper employed by said said committee, to ascertain whether such statement is accurate. For failure to allow such examination, whenever requested by the Finance Committee, the persons or corporation 194 owning any wires in such conduits shall be liable to a fine of not less than one hundred nor more than five hundred dollars for each wire of said person or company admitted or proven to be in such conduit; and for failure to pay such semi-annual compensation upon the days above specified, the person or company shall be liable to a fine of not less than ten nor more than five hundred dollars; each day's failure to be a separate offense.

33. The conduits herein required shall be extended 195 from time to time, whenever required by the City Council, to cover streets or alleys upon which the Council may determine, from time to time, that no overhead wire shall be run.

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Exhibit No. 2 with Complainant's Bill.**AN ORDINANCE.**

Approved March 15, 1902.

198 TO AMEND AND REORDAIN SECTION 27, OF CHAPTER 88,
RICHMOND CITY CODE (1899), REQUIRING TELEGRAPH,
TELEPHONE AND ELECTRIC LIGHT AND POWER WIRES
AND CABLES TO BE PLACED UNDERGROUND ON CERTAIN
STREETS OF THE CITY.

Be it ordained by the Council of the City of Richmond :

1. That section 27 of Chapter 88, Richmond City Code (1899), be amended and reordained so as to read as follows :

27. The telegraph, telephone and electric light and
199 power overhead wires and cables (other than trolley
wires) and all other overhead appliances for conducting
electricity, and the poles therefor heretofore
and now being in any street, alley or public ground of
the city, owned and maintained under any existing
franchise, are hereby ordered to be removed from
the following named streets, to-wit : On Broad street,
from the western side of Adams street to the east side
of 11th street ; on Bank street from the western side of
9th street to the eastern side of 12th street ; on Main
200 and Cary streets from the western side of 7th street to
the eastern side of 14th street ; on 7th, 8th, 9th, 10th,
11th, 12th, 13th and 14th streets from the northern side
of Broad street to southern side of Cary street,
within twelve months from the date of the approval of
this ordinance, and any such wires hereafter installed
under any existing franchise or under any franchise
hereafter granted shall, within the limits of the above
described district, unless otherwise provided by the
City Council, be placed underground within twelve
months from the date of permission granted by the

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City Council. Any company, corporation, partnership or individual, owning or controlling any such overhead wires, cables or appliances, or poles, that refuses, neglects or fails to remove them from overhead within the time as hereinbefore provided, or which fails to place said wires, hereafter installed in the said underground district, underground as hereinbefore provided, shall be liable to a fine of not less than \$100 nor more than \$500 for each pole so remaining, to be imposed by the police justice of the city of Richmond, and for 202 every week of continued failure and neglect to so remove them after the imposition of the fine above mentioned, such company, corporation, partnership or individual shall be liable to a fine of not less than \$100 nor more than \$500, to be imposed as above stated. And any overhead wires hereafter installed within the said underground district shall be installed subject to the provisions of this ordinance.

2. This ordinance shall be in force from its passage.

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Exhibit No. 3, with Complainant's Bill.

AN ORDINANCE.

Approved December 18, 1903.

TO AMEND AND REORDAIN SECTION 28 OF CHAPTER 88, RICHMOND CITY CODE, 1899, RELATING TO THE 204 TELEGRAPH, TELEPHONE AND ELECTRICAL LIGHT AND POWER WIRES AND CABLES IN CONDUITS WITHIN CERTAIN TERRITORY.

Be it ordained by the Council of the City of Richmond :

1. That section 28 of Chapter 88, Richmond City Code, 1899, be amended and reordained so as to read as follows :

28. That all telegraph, telephone and electric light and power wires and cables, including feed (but exclud-

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ing trolley wires), and all other appliances for conducting electricity, shall be removed from the streets, alleys and public grounds of the city of Richmond within the territory mentioned in the foregoing section within six months after the passage of this ordinance, and every individual, partnership, corporation or company owning such wires within said territory shall within two months after the passage of this ordinance submit to the Committee on Streets and Shockoe Creek

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plans and details, showing the location, plan, size, construction and material of such conduits. Such plans may be altered or amended by said committee, and when satisfactory to it shall be approved, and thereupon it shall be the duty of the owner of such wires to proceed with the construction of such conduits in accordance with the plans so approved, and in a manner satisfactory to the City Engineer. The pavement of the streets and alleys wherein such conduits are laid shall be properly replaced, and shall be kept

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in proper repair to the satisfaction of the City Engineer, and the city shall be saved harmless from any and all damages arising from laying such conduits. Such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys, and shall provide for an increase thereof to at least the extent of 30 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership or individual directly or indirectly, without the consent of the Committee on Streets and

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Shockoe Creek, but the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires. After obtaining the consent of the Committee on Streets and Shockoe Creek, any other person or corporation now having wires in the streets, or hereafter desiring to run wires therein, may occupy necessary and proper portions of such conduits upon such terms as may be agreed upon with the petitioner; and in case of a disagreement, upon terms to be determined by arbitration, as herewith provided; and any such company, corporation,

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partnership, or individual so placing its wires underground in any street, alley or public ground of said city shall, upon notice from the city or any of its departments, that a local improvement or gas, sewer or water main, or branch thereof, is to be constructed or repaired in such manner as will necessitate the moving or altering of its conduit or conduits, or their appurtenances, of said individual, partnership, company or corporation, move or alter the same at its own expense so as to permit the construction of the improvement 210 where ordered, and should any company or corporation omit to comply with such notice, the conduit, or conduits, or their appurtenances, may be altered or moved by the city, and the cost and expense thereof recovered from such individual, company or corporation. Manholes shall at all times conform to the grade of the streets. The location, size, shape and subdivision of such conduits, and the material of which they shall be made and the manner of construction, shall be satisfactory to the City Engineer. The work of laying 211 underground conduits, tubes, pipes, electrical conductors, cables and wires, shall be under the direction and to the satisfaction of the Superintendent of Fire-Alarm and Police Telegraph, who shall at all times have free and unobstructed access to the conduits, tubes, pipes, electrical conductors or cables, for the purpose of inspecting the same or making connection therewith for conduit wires or conductors in use or to be used by the city.

2. This ordinance shall be in force from its passage. 212

DECREE FILING ANSWER TO AMENDED BILL.

(137) Entered and filed July 3d, 1905.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Western Union Telegraph Co.	}	Decree.
vs.		
City of Richmond.		

This day came again the parties by their attorneys and on the motion of the City of Richmond, by its solicitor and counsel, leave is given it to file its answer to the amended bill in this cause which is accordingly done.

EDMUND WADDILL, JR.,
U. S. Judge.

Richmond, Va., July 3rd, 1905.

ANSWER TO AMENDED BILL.

(138) Filed July 3, 1905.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Western Union Telegraph Co., Complainant,	}	In Equity.
against		
City of Richmond, Defendant.		

ANSWER TO AMENDED BILL.

The answer of the City of Richmond to an amended bill of complaint exhibited against it in the Circuit Court of the United States for the Eastern District of Virginia by the Western Union Telegraph Company, a corporation.

This respondent, without waiving its objection, by way of demurrer or otherwise to the many errors and imperfections in the said amended bill of complaint, or answer thereto, or so much thereof, as it is advised it is material for it to answer, answering, says:

1. That articles I, II and III are substantially, if not wholly, the same as the charges made in the complainant's original bill of complaint in this cause, all of which said three

(139) charges are definitely and particularly answered in this respondent's answer heretofore made and filed by decree of this honorable court to the said original bill, which said replies, contained in its said last mentioned answer, this respondent makes as if herein repeated and prays may be taken and considered as an answer to the said first three articles of the said amended bill.

2. That in answer to article IV of the said amended bill, this respondent says that it does not deny the truth of the charges made in said article IV which are substantially the same as those made in the original bill, except the statement contained in the last paragraph of said article in regard to the original construction of the complainant's lines of telegraph in the City of Richmond by its predecessor, the American Union Telegraph Company, and the alleged consolidation of the said American Union Telegraph Company with the complainant company, and by that means, the acquisition of the rights and privileges of the said American Union Telegraph Company by the complainant, as to which last mentioned several allegations this respondent admits to be true as alleged.

3. Respondent admits the statements made in articles V. and VI, of the said amended bill, which are substantially, if not wholly the same, as those contained in the said original bill, except so far as said articles may undertake to construe and place an interpretation on the several acts of Congress, which this respondent insists speak for themselves, the same being plain and unambiguous and requiring no construction or interpretation.

4. Respondent admits the truth of the several allegations made in article VII, of the said amended bill so far as the same acts are done by the complainant and also admits the charge made that all of the streets and alleys of the City of Richmond (140) are post-roads, under acts of Congress and the revised statutes and Constitution of the United States, but respondent does not admit, but on the contrary denies the conclusions of law drawn by the complainant from the doing of the said acts and especially denies that by virtue of the said acts, the doing of which is alleged in the said article, that the rights of the complainant in the streets, alleys and other public places of the City of Richmond "became vested" in any sense which would prevent the City of Richmond from exercising its police power or from revoking all rights which the complainant company has as the successor of the American Union Telegraph Company to erect poles and string wires thereon, along and over the

streets, alleys and other public places of the City of Richmond, which right of revocation was expressly reserved in the ordinance approved March 17, 1880, and in this connection respondent says:

(1) That on March the 17th, 1880, the date at which the American Union Telegraph Company, of which the complainant company is the assignee and successor, obtained permission from the Council of the City of Richmond to erect telegraph poles and run wires along and over the streets of the city, the Statute of the State of Virginia, authorizing telegraph companies to transact business in this State provided; that "any telephone or telegraph company, chartered by this State or any other State, or by an act of Congress of the United States, may construct and maintain such telephone or telegraph along any of the State or county roads or public works, and over the waters of the State, and along and parallel to any of the railroads in this State, provided the ordinary use of such roads, works, railroads and waters be not thereby obstructed and along the streets of any city or town, with the consent of the Council or trustees thereof, etc.," (Acts of the General Assembly of Virginia, 1879-1880, p. 53), which is substantially the same provision contained in the Code of Virginia, 1887, as section 1287. It thus plainly appears that under the Statute law of the State, in force at the date when the said American Union Telegraph Company, the assignor of the complainant, sought and obtained permission from the Council of the City of Richmond to exercise its rights as a telegraph company, that it could not lawfully obtain such rights from the City of Richmond except "with the consent of the Council" of the respondent city.

(2) That the said American Union Telegraph Company, recognizing its obligation to meet this requirement of the Statute, applied to the Council of the City of Richmond, and (141) that by an ordinance approved March 17th, 1880, leave was given the said American Union Telegraph Company to erect telegraph poles and string wires along and over the streets of the city, which ordinance is in the words and figures following:

AN ORDINANCE

To allow the American Union Telegraph Company to erect telegraph poles and run wires along certain streets.

(Approved March 17, 1880.)

Be it ordained by the Council of the City of Richmond, That leave is hereby given the American Union Telegraph Com-

pany by its officers, employees or agents, to erect the necessary poles, the same to be symmetrical in shape, properly painted, and duly secured from falling, to convey the wires of said company through the streets of the city from a point on Broad street, near its intersection with Harrison street to Pine street; thence down Pine to Belvidere, along Belvidere from Grace to Canal; thence across Madison, Jefferson and Adams to Byrd street, along Byrd from Adams to Twelfth street, along Twelfth from Byrd to Canal street, Canal from Twelfth to Thirteenth, Thirteenth from Canal to Main street; the said poles to be erected inside of the curbstones, and with as little interruption to travel and traffic as possible, and under the general supervision and control of the City Engineer. It is further understood and agreed as part of the consideration of this contract, that the said American Union Telegraph Company shall not assign this route or privilege to any other person or corporation whatever, and that the privilege hereby granted shall be revocable at the pleasure of the Council." (Ordinances and Resolutions of the City Council of Richmond, 1878-1880, p. 28.)

(3) That on July 16th, 1881, the Council of the City of Richmond amended Chapter 34 of the City Ordinances, 1879, relating to streets, by adding two additional sections thereto, (142) the first of which prohibited the erection of any poles or posts by telegraph companies on Main street, in the City of Richmond, and the second of which transferred from the American Union Telegraph Company to the Western Union Telegraph Company, all rights and privileges to which the said American Union Telegraph Company was entitled under the ordinance approved March 17th, 1880, which said ordinance is in the words and figures following:

AN ORDINANCE

To amend Chapter 34 of the City Ordinances, concerning Streets.

(Approved July 16, 1881.)

Be it ordained by the Council of the City of Richmond, That chapter 34 of the City Ordinances be amended by adding thereto the following sections:

"60. No telegraph poles or posts shall be erected on Main street, in the City of Richmond, or any part of said street, and all such poles or posts now on the said street shall be removed within thirty days from the due publication of this ordinance by the party or company maintaining or using the same. Every

day's continuance of such pole or post on Main street after the expiration of such period of thirty days shall constitute a separate offence, and shall be punishable by a fine of not less than five dollars nor more than ten dollars for each pole or post, recoverable in the Court of the Police Justice against the party, company or corporation maintaining or using the said pole or post.

"61. The privilege of erecting poles or posts in this city, granted the American Union Telegraph Company by an ordinance approved March 17, 1880, so far as the same is not inconsistent with the provisions of section 60 of this chapter, is hereby granted the Western Union Telegraph Company; but (143) all license or permission to any party or corporation to erect such poles or posts on Main street is hereby revoked and annulled." (Ordinances and Resolutions of the City Council of Richmond, 1880-1882, p. 17, Richmond City Code, 1885, p. 183.)

(4) That at a meeting of the Committee on Streets held on Friday, December the 9th, 1881, Major Robert Stiles appeared as attorney for the complainant company in regard to the removal of poles from Main street as required by the last above recited ordinance and made application on behalf of the complainant company, submitting the draft of a resolution in his own handwriting, having for its object the granting to the said complainant company a certain right along the streets of the city, and also relieving it of all penalties, if any, incurred by the said company under the said last recited ordinance, the draft of which resolution was duly recommended by the said Committee to the Board of Aldermen for adoption and was duly passed, and on January 5th, 1882, approved by the Mayor of the City of Richmond, all of which will more fully and at large appear by reference to the original draft of said resolution; an extract from the minutes of the proceedings of the Committee on Streets, held December 9th, 1881; a copy of the report of said Committee submitted to the Board of Aldermen on the — day of December, 1881, and an officially certified copy of said resolution approved by the Mayor on January 5th, 1882, herewith filed, marked exhibits "R" No. 1, 2, 3 and 4 respectively, and prayed to be taken and read as a part of this answer.

It thus appears that the complainant company, and its predecessor, the American Union Telegraph Company, fully understood and recognized the necessity of applying for and obtaining permission of the Council of the City of Richmond to erect its poles and run its wires along and over the streets and

alleys of the said city, and that the conditions under which said consent was given were that the poles of the company should be erected and maintained "under the general supervision and (144) control of the City Engineer," and the privileges there by granted "should be revocable at the pleasure of the Council."

Respondent is advised, believes, and therefore charges, that the complainant company is estopped by its conduct in making application for and in accepting the privileges granted by the aforesaid ordinance, from claiming that the said act of the General Assembly of Virginia, and the said ordinances of the city are in violation, either of the acts of Congress or of the Constitution of the United States, and respondent is also advised, believes and charges that the said ordinances in connection with the acceptance of the provisions thereof by the complainant company, constitute a contract which the said company had the power to make and did make, and having thus accepted the privileges granted by the said ordinances and the advantages which sprung from them, said company cannot be permitted to hold on to the privileges or rights granted, and at the same time repudiate the conditions and restrictions placed upon it as conditions under which said privileges were granted. Respondent in effect said to complainant by the said ordinances, "You can occupy the streets under certain terms." The company accepted these terms and to permit it to repudiate the conditions under which it obtained such permission would be to allow said company to hold on to the privileges and rights granted, and, at the same time, repudiate the conditions, without the acceptance of which it could never have obtained the privileges which it sought.

5. Respondent admits that it has enacted an ordinance concerning wires, poles, conduits, etc., in, over and under the streets of the city, carried into and published as Chapter 88 of Richmond City Code, 1899, a copy of which is filed as Exhibit No. 1 with the bill and copies of certain amendments thereto, which are also filed as Exhibits Nos. 2 and 3; but this respondent denies that said ordinances and amendments are grossly unreasonable and illegal or in gross violation of and repugnant to Article 1, Section 2 of the Constitution of the United States, and Article 14, Section 1 of the Amendments to the Constitution (145) of the United States and the said act of Congress approved July 24th, 1866, and the other acts of Congress particularly mentioned in said bill, and respondent also denies that said ordinance and amendments thereto are in gross violation of complainant's rights, powers and privileges under the aforesaid provisions of the Constitution of the United States and amendments thereto and the aforesaid enactments of Congress, and

also denies that said ordinance and amendments thereto impose unreasonable and illegal burdens and restrictions upon the business of foreign and interstate commerce conducted by the complainant or deprive the complainant of its rights, powers, privileges and property granted under said Statute and the Constitution of the United States; but on the contrary respondent is advised, believes and therefore charges, that the said ordinances, and the amendments thereto, are in every particular constitutional and valid and not, according to the true intent and meaning thereof, in conflict with the Constitution of the United States or the acts of Congress passed in pursuance thereof.

And this respondent, further answering, emphatically denies that the conditions, regulations and restrictions prescribed by said Chapter 88 and the amendments thereto, when examined, will appear to be stimulated by a desire to oppress and control, or defeat the existence of your orator within the limits of the City of Richmond, by bringing the control of the complainant's property wholly under the management of the agents and employees of the City of Richmond, but, on the contrary, this respondent asserts that it has but one desire and that to promote the public good and to secure the safety of its citizens and their property by removing from the business streets of (146) the city dangerous and unsightly obstructions, and to cause the complainant, and all persons in a like situation, to obey the just ordinances of the city passed in pursuance of the police power vested in it under the laws of the land, which power it could not surrender and, as a matter of fact, did not surrender; but, on the contrary, expressly reserved this power in the grant to the complainant's predecessor, the American Union Telegraph Company.

6. Respondent denies the several allegations in Article X, and in answer to the said article says, as to the provision complained of in section 1 of said chapter 88, which confers upon the City Engineer the power to determine the size, quality, character, number, location, condition and appearance of the complainant's poles located in the city, and which gives him the power to order changes in the location of same, etc.; that the power to exercise this control is expressly reserved in the ordinances hereinbefore quoted, relating to the erection of poles by the complainant and its assignor, on the streets and alleys of the city; but independent of, and apart from, the express agreement between the complainant company and the respondent, contained in said ordinance, it is clearly within the police power of respondent to exercise each, all and every of the powers conferred by section 1.

7. Respondent, answering Article XI of complainant's amended bill, says that the only effect of said section is to provide that poles outside of the underground district shall remain upon the streets, alleys, and other public places of the City of Richmond upon the terms and conditions set forth in said chapter, which terms and conditions this respondent avers are just and reasonable, as will be hereinafter shown.

(147) 8. This respondent, answering Article XII of said amended bill, denies that the requirement of section 4 of said Chapter 88 is unreasonable and unjust, and unreasonably interferes with the business of the complainants, as alleged in said amended bill, but, on the contrary, says that said requirement is reasonable and just, and is so recognized in other municipalities of any importance in the country, otherwise the streets of populous cities would become seriously obstructed by a great multitude of poles, each company having, in such condition, the right to erect and maintain its own poles; but, however this may be, the complainant company has to the present time acquiesced in said requirement, and has never found it necessary to make complaint to respondent of any injustice allowed or permitted, in this regard, nor has it, in any way, brought to the attention of respondent any act of injustice done it, or encouraged or permitted by the respondent, its officers or agents, and if any such act should be done hereafter it will be time enough to make complaint, and respondent is advised that it must be presumed that no act of injustice will be done it in the future, and therefore that complainant has no right to complain or implead the respondent in this behalf, until it can point to some act of injustice done to it or actually threaten to be done to it in regard to the joint use of poles.

And further answering this respondent says that it denies that the requirement that the complainant shall properly protect its wires is unreasonable or unjust, but, on the contrary, says that it is proper that the complainant should be required to protect its wires, so that the wires of other persons or corporations on the same poles with the wires of the complainant, should not be injured or rendered dangerous by coming in contact with such wires, and that it is entirely reasonable that the failure of the complainant to comply with this requirement should be punished by the fine imposed by said section.

9. Respondent denies the charge made in Article XIII that section 5 of said Chapter 88, which gives the City Engineer the right to determine the size, quality, character, number, location, condition and appearance and manner of location of the poles of any company erecting poles in any of the

streets, alleys or other public places of the City of Richmond, is violative of the provisions of the act of Congress of July 24, 1866, for it is certain that each and every of these conditions must in some degree effect the free use of the streets, alleys and public places of the City of Richmond, and may therefore be referred to the limitation in the act of Congress contained, that the right of a telegraph company to use and occupy a public highway shall be subject to the condition that such use does not interfere with the ordinary use of the same for travel, but, more than this, respondent says, and again reiterates, that the right to impose these several requirements was expressly conceded by the franchise ordinance under which the complainant accepted its privileges, and has exercised the same since it commenced the transaction of its business in the City of Richmond, as will be seen from said ordinance of March 17, 1880, which granted to the American Union Telegraph Company the right to erect telegraph poles and run wires on certain streets, which expressly provides, however, that the poles are "to be erected inside of the curbstone, and with as little interruption to travel and traffic as possible, and *under the general supervision and control of the City Engineer.*"

10. Respondent denies the charge made in Article XIV. of said amended bill, and insists that the provision contained in section 6 of said chapter 88, is a reasonable and proper requirement and consonant with the practice adopted in other cities of like size with the City of Richmond and intended to secure the preservation of property against destruction by fire, and to arrest dangerous conflagrations, in the imposition of which requirement this respondent was *exercising a governmental power*, promotive of the public weal and intended to protect not only the property of its citizens in general, but the property of the complainant company, itself and the lives of its employees. (149)

11. Respondent denies the charge made in Article XV. of said amended bill, and says that the reservation thereby made is not greater than the power residing in respondent by virtue of its police power, even without such reservation. So true is this that any stipulation which respondent might make in an attempt to exempt any company conducting so dangerous a business as that in which complainant is engaged, from its obligation to submit the conduct of its business to the supervision of the respondent, would be *ultra vires* and of no effect whatsoever.

12. Respondent denies that sections 9, 10, 11, 12 and 13 of Chapter 88 abridge complainant's right under the act of

Congress, as alleged in said amended bill, and, on the contrary, says that the imposition of a fee of \$2.00 upon each and every pole owned and used by the complainant company in maintaining its wires upon the streets, alleys, and other public places of the City of Richmond is constitutional, legal and reasonable, in view of the great expenditures made by respondent to grade and improve its parks, streets, lanes, and alleys where such poles are located, inasmuch as the same may be, by reason of such improvement, more cheaply and conveniently erected and maintained, than would otherwise be the case, and, also in view of the necessity which imposes upon the respondent the duty to reasonably inspect the poles, wires and works of the complainant company and other companies occupying the streets, alleys and other public places of the City of Richmond for like purposes; but, however this may be, the complainant, by its long acquiescence in the payment of such fee or charge without protest or objection, namely, from December 10, 1885, to the institution of this suit, in June, 1904, is estopped from objecting to the said sections on the grounds mentioned in the said amended bill of complaint.

(150)

13. Respondent denies the allegations made in Article XVII. of the said amended bill that section 15 of said chapter 88 is unreasonable, and, in order to show the frivolous character of the charges in the complainant's bill, in general, and this charge in particular, and thoroughly to vindicate the reasonableness of said section 15, begs to quote the same *verbatim*, which section is in the following language:

"15. The Chief of the Fire Department and the Superintendent of Fire Alarm and Police Telegraph shall each have power, and it shall be their duty to examine and inspect, from time to time, all poles and every wire or cable over the streets, public grounds or buildings when such wire is designed to carry an electric current; shall notify the person or corporation owning or using such poles, *when any such pole is unsafe or owning or operating any such wire or cable whenever its attachments, insulations, supports or appliances are unsuitable or unsafe, and that the said poles, wires or cables must be properly replaced, renewed, altered or constructed; and shall require the owner of any wire abandoned for use to remove the same.* Any person or company failing to perform any requirements made of him or it by either the said Chief of Fire Department or said Superintendent, under this section, shall be liable to a fine of not less than five nor more than one hundred dollars; each day's failure to be a separate offence."

14. Respondent denies the allegation made in Article XVIII. that section 16 of Chapter 88 is violative of complainant's rights under the act of Congress in that while the complainant has the right upon the streets and alleys of the City of Richmond to construct and maintain telegraph lines subject to reasonable regulations of the city, said section 16 limits and qualifies those rights by prohibiting the complainant from obtaining additional routes for its wires unless authorized by the (151) Committee of the City Council, subject to the conditions, restrictions, limitations and charges set forth in Chapter 88. It seems almost vain to answer any more fully the said charge than to deny the same, but respondent must say that it seems to be "unreasonable" in the last degree, that the complainant should maintain that it may, *at its own volition*, occupy additional routes when its business requires additional lines *freed from the obligations which rested upon it when its original franchise right was given*—namely, "under the general supervision and control of the City Engineer," and likewise free from proper police regulations.

15. Respondent denies the allegation made in Article XIX. that section 25 of said Chapter 88 is unreasonable, the provisions of which section, as this respondent insists, are reasonable and proper.

16. Respondent denies the charge made in Article XX. that sections 27 and 28 of said Chapter 88, as amended, are wholly unreasonable and void as applied to complainant, and proceeding to answer the several charges and allegations in the said Article XX. made, says:

(a) That the provision of section 28 which requires all companies desiring to construct conduits in the underground territory to submit maps, plans and details showing the location, plan, size, construction and material of such conduits to the Committee on Streets and to make such plans subject to the alteration and amendment of the said committee and not allowing such conduits to be constructed until the same are approved by said committee, are reasonable and just requirements. To depart from this and allow companies to determine the location, plan, size, construction and material of conduits and their location in the streets, alleys and public places of the city, would be to abandon the management of the municipal affairs of the city and turn the same over to a corporation not responsible in any degree for the proper management and conduct of its said affairs.

(b) That the provision contained in section 27 which requires that overhead wires thereafter installed within the underground territory shall be subject to the provisions of Chapter 88, is not illegal, as in the said amended bill charged.

(c) That the requirement made in section 28 in connection with the construction of such conduits, that companies making such construction in the streets, alleys and public places of the city properly replace the pavement of the streets and alleys and keep the pavement of such streets and alleys in proper repair, to the satisfaction of the City Engineer is not an unreasonable burden, as in the said amended bill charged, but is reasonable and just, a requirement universally made of all public service corporations having privileges in streets, alleys and other public places of municipalities; nor is the requirement of said section doubtful of construction, as suggested in said amended bill, but, on the contrary, the same is clear and unambiguous, when read in the light of the well known fact that the replacing of the surface of streets disturbed by the digging up of the same, in order to become stable, requires time—that is, that the surface of no street can be at once restored to its former compactness, except by the aid of climatic and other like agencies, and consequently experience has taught that for twelve months or more after the replacing of the surface of a street, depressions will occur from time to time which must be replaced and repaired in order completely to restore the street to its former condition, therefore this most reasonable requirement is generally, if not universally, made in ordinances granting the use (153) of the streets and alleys of the City of Richmond, and does not operate in an unreasonable manner and impose excessive or unusual burdens.

(d) Nor is the condition in said section 28 made, that all conduits shall be of sufficient capacity to accommodate the wires in such street or alley and also to provide for an increase thereof at least 30%, unreasonable or unjust; that this provision is one generally, if not universally, required of companies placing conduits in the streets of a city, and is intended to prevent the frequent disturbance of public travel upon the streets incident to the digging up of the same for the relaying of additional conduits as the demand for additional wires increases from time to time, and the fact that such requirement does of necessity impose additional expense upon the company constructing such conduit, is a matter of small concern compared with the great good secured to the public in preventing the interruption of travel consequent upon a constant and repeated digging up the the streets; that the use of the additional

space, so required to be constructed, is to be determined upon by the Committee on Streets, is likewise reasonable and just, otherwise any corporation owning the additional space might, by a refusal to grant permission for its use, necessitate the laying of additional conduits in the street by another person or corporation which might desire to use such space, and thus altogether defeat the beneficial object for which such additional space is required to be constructed.

(e) Respondent denies that the provision in section 28 which requires the wires of the city to be carried in such conduits free of charge to the extent of one duct, in such conduit, is oppressive, burdensome and illegal, but, on the contrary, says that it is a reasonable police regulation intended better to protect and facilitate the police and fire alarm telegraph system of the city, for the use of which separate conduit each and every (154) person or corporation owning such conduit is fully compensated in the privilege accorded it in the granting of its franchise rights on the streets, alleys and other public places of the city.

(f) Respondent denies that the provision in said section 28, by which it is required that the location, size, shape, and supervision of such conduits, and material of which they shall be made and the manner of construction shall be satisfactory to the City Engineer, is unreasonable, but, on the contrary, says that it is a reasonable requirement and consonant with the grant of the franchise right to the complainant company, in which grant it is expressly provided that conduits, poles and wires shall be "*under the general supervision and control of the City Engineer.*" Whether or not a conduit suitable for the exclusive business of the complainant corporation can be constructed more cheaply than one by some other corporation operating and maintaining electrical wires in the streets, alleys and public places of the city cannot be reasonably urged, as respondent is advised, against the reasonableness of said section 28, for the obvious reason that it is entirely impracticable for each and every of the numerous companies entitled to maintain electrical wires in the streets, alleys, and other public places of the City of Richmond, to have separate conduits; they would occupy a large part, if not the whole, of the space under the surface of the streets, materially embarrassing the respondent in obtaining proper and convenient locations for its gas pipes and water mains, if not leaving insufficient and inadequate arrangements for the same, as well as other public utilities.

(g) Respondent denies that the supervision given to the Superintendent of Fire Alarm and Police Telegraph and the

right to have undisturbed and free access to the conduits, tubes, pipes, etc., for the purpose of inspecting the same and making connections therewith for conduit, wires, or conductors is unreasonable and unjust, but, on the contrary, avers that it is essential to the safe and suitable management of the wires to be carried in such conduits.

17. Respondent denies the charge in Article XXI. made that section 29 of said chapter requires that whenever any wire or cable comes out of a conduit for the purpose of being run overhead that all precautions which may from time to time be required by the Committee on Streets and Shockoe Creek shall be taken for the protection and safety of persons and property, "no matter how unreasonable said requirement may be, without defining what said precautions shall be," and in this connection respondent says that the objection thus made to section 29 by the complainant is unreasonable and not justified by the language of said section, that language being "that all precautions which may be required from time to time by the Committee on Streets shall be taken for the protection and safety of all persons and property." To object to this requirement seems to respondent "*unreasonable*" in the last degree. It is a well known fact that wires emerging from conduits and running vertically, or nearly so, as they must, to their positions on poles are greatly exposed, and if charged with currents of electricity, increased by some accidental cause, in such position, upon crowded streets, would be dangerous to pedestrians upon the sidewalk, and unless properly guarded by proper precautions, otherwise such wires so charged might communicate dangerous currents of electricity; under such circumstances, respondent submits, that it is but reasonable that "from time to time," as improved methods of protection may be invented, that the owners of wires should be compelled to adopt improved methods for the protection of life and property.

18. Respondent answering Article XXII., says that it does not feel called upon to make any denial of the allegations contained therein, inasmuch as said article makes no charge that any of the requirements therein set out are unreasonable, unjust, unconstitutional, or impracticable. Whether the recital therein of the provisions of section 30 of said Chapter 88 are correctly made or not is a question submitted to the determination of the court, easily ascertained by a comparison of said recitals with said section of said chapter which is made an exhibit with the said amended bill of complaint, to which section respondent appeals for the correct statement of its provisions.

19. Respondent denies the charge made in Article XXIII. that section 31 of said Chapter 88 seeks to destroy the rights and privileges of the complainant, enjoyed under the act of Congress of July 24, 1866, by limiting the privilege of building and owning conduits within its said streets and alleys to a period of fifteen years, and by attempting to reserve, contrary to the said act of Congress, the right to put restrictions, conditions and charges upon the privilege of building or owning conduits within its streets at the end of the said term; and also by seeking to reserve the right to order the complete removal from the streets and alleys of the respondent of the conduits constructed therein.

In addition to this denial, respondent says that the City of Richmond, by the enactment of said section, had no desire whatever to place any unreasonable limitation upon the rights of any company owning or maintaining wires and conduits in its streets and alleys; that it has been, and is, the custom of many municipalities to limit this right to a term of years, frequently much less than fifteen years, and the Constitution of this State now prohibits the granting of any such right for a greater period than thirty years by any municipality within the limits of this Commonwealth, and in this connection respondent calls attention to the fact that the limitation complained of in effect enlarges the present rights of the complainant company on the streets and alleys of the City of Richmond, which, under (157) the provisions of the ordinance granting such rights, makes such grant "revocable at the pleasure of the Council."

20. Respondent denies that section 32 of chapter 88 is in violation of the provisions of the act of Congress in that it seeks to impose a charge upon the complainant for the privilege of using and occupying the streets of the city with its poles, wires and conduits, by requiring the payment of a certain sum of \$2.00 per mile, per wire, per annum, for every wire owned or used by complainant, and in reserving to itself the right on January 1, 1900, to charge larger compensation for the rest of the period of 15 years during which such conduits may be used or occupied by the complainant.

And further answering, said article says that it denies that the charge of \$2.00 per mile, per wire, per annum is unreasonable or unjust for the privilege of using and occupying the streets of the city with its conduits, and likewise denies the allegation that it "would require no expenditure of money on the part of the city for inspection," but, on the contrary, says that such inspection is not only necessary and proper, but essential to the proper maintenance of the said conduits and the se-

curity of the life and property of its citizens, the preservation of which, the charter of the City of Richmond imposes upon it.

21. Respondent answering Article XXV., says that it is true that section 33 of said Chapter 88 provides that the Council of the City of Richmond may, from time to time, extend the limits of the underground territory, but this respondent insists that this requirement is reasonable and just and essential, in view of the constant widening of the business districts of the city made necessary by the increasing population of the city and its increasing business capacity and facility.

22. Respondent answering Article XXVI., says that it is true that sections 27 and 28 of Chapter 88 require, before the construction of conduits by any person or corporation operating and maintaining electrical wires and appliances in the streets, alleys and other public places of the city, to file plans with the Committee on Streets, but it is not true that such conduct could be reasonably construed as a surrender of any rights of the complainant secured to it by the Constitution of the United States, or under the act of Congress of July 24, 1866, or the acts amendatory thereof, any doubts to the contrary notwithstanding, which the complainant may have on that point.

Respondent further answering said article, says that this requirement does not interfere with or infringe upon its legal and constitutional rights, and does not desire to deprive the complainant of any of its constitutional and legal rights, but insists that it should comply with the requirements of the said sections 27 and 28, which are reasonable and just, and as respondent believes, essential to the proper supervision of the dangerous business conducted by the complainant, as well as that of other persons and corporations in a like situation.

23. Respondent, in answer to Article XXVII., says that if it be true, as it undoubtedly seems to be, that the complainant, by refusing to comply with the provisions of section 28 of said Chapter 88, has laid itself liable to the imposition of fines and penalties which, in the aggregate, would amount to a large sum, it is also true that the complainant alone is responsible therefor, and by its own conduct, with full knowledge of the consequences, has incurred such liability.

As to the threat of the respondent, through its attorney, respondent says that while the notice to the complainant that the respondent would insist upon a compliance with said section 28, given by its City Attorney, was not essential to the imposition of the fine therein provided for, yet it was given in a spirit of fairness and as a warning of what would result in the event

that complainant failed to comply with the provisions of said (159) section, and, in good faith, was intended to afford an opportunity to avoid trouble and litigation, which both to itself and the City of Richmond, would be annoying.

As to the charge in said Article XXVII. made, that the City of Richmond proposed to use the penal feature of said provision of said chapter 88 as a means of requiring and compelling the removal of the poles, wires, cables and appliances of the complainant from the streets, alleys and other public places of the City of Richmond in the underground territory, respondent says that it knows of no other reason why the penalty should be imposed in any ordinance except as a means of compelling obedience to and compliance with the provisions of the same.

24. Respondent says, in regard to Article XXVIII., that it is merely a repetition of previous charges in the said amended bill of complaint made, which have already been denied, or otherwise answered, it does not feel called upon to make any other answer thereto except to deny the said allegations therein made.

25. Respondent, answering Article XXIX., says that while it is true in a certain sense that all of the sections of said Chapter 88 form one connected piece of legislation for the governmental control and regulation of the wires, poles and conduits of companies owning, operating and maintaining electric wires and appliances in, over and upon the streets and alleys of the City of Richmond, yet it is not true as alleged in said article, and respondent therefore denies that the various sections are "inter-dependent and inter-related with each other," in such a sense that they are not separable, so that one provision, or one section of the said chapter might be declared illegal, because unreasonable or unconstitutional, while others might be upheld.
(160)

26. Respondent also denies the right of the complainant to invoke the aid of a court of equity by writs of injunction to enjoin and restrain the defendant from enforcing any provisions of said chapter, unless it be alleged and shown that the respondent is proceeding, or is about to proceed, to enforce such provision, nor will this Honorable Court declare and decree any provision of the said chapter unreasonable, illegal, null and void unless it be alleged and proved that the respondent is about to seek to enforce the same against the complainant.

Respondent also denies that Chapter 88 and each and every section thereof, and all amendments thereto are grossly unreasonable and illegal and repugnant to the provisions of the Constitution of the United States and to the aforesaid act

of Congress and the amendments thereto, but whether or not all of the provisions of said sections, and amendments thereto, be constitutional or not, is a matter of no importance in this litigation, provided the provisions of the ordinances, amending sections 27 and 28, namely, the ordinances approved respectively March 15, 1902, and December 18, 1903, filed as Exhibits Nos. 2 and 3 with complainant's amended bill, are valid and constitutional, nor is the constitutionality of these particular sections as so amended of any importance: provided, it should be ascertained, as hereinbefore charged, that the complainant is estopped by its conduct from claiming that the said sections are unconstitutional. And in this connection respondent calls the attention of the court to the fact that there is no charge in the bill made that respondent is seeking to enforce against complainant any provision of said chapter or its amendments, except the provisions of said sections 27 and 28, and therefore all other questions attempted to be raised by said bill as to the illegality or unconstitutionality of the other sections of said Chapter 88 are moot questions, which the court cannot and will not pass upon or determine in this litigation.

27. Respondent having fully answered, prays that the injunction heretofore granted in this cause may be dissolved; (161) complainant's bill dismissed and that respondent may be dismissed with its costs in this behalf sustained.

In testimony whereof, respondent has caused these presents to be subscribed by its Mayor and its corporate seal to be hereto affixed by its Treasurer.

CITY OF RICHMOND,

By CARLTON McCARTHY,

[Seal of City of Richmond]

Mayor.

Attest:

C. H. PHILLIPS, Treasurer.

H. R. POLLARD,

City Attorney,
Solicitor for Defendant.

STATE OF VIRGINIA, }
City of Richmond, } to-wit:

(162) I, R. T. Lacy, Jr., a notary public in and for the city and State aforesaid, do certify that Carlton McCarthy,

Mayor of the City of Richmond, made oath before me that the statements contained in the foregoing answer so far as based on his own knowledge are true, and so far as based on information derived from others he believes them to be true; and I do further certify that C. H. Phillips, Treasurer, whose name is also signed to the foregoing paper, made oath before me that the seal attached thereto is the seal of the City of Richmond.

Given under my hand this 30 day of June, 1905.

R. T. LACY, JR.,
Notary Public.

EXHIBIT R, No. I, WITH ANSWER.

Extracts from Minutes of Committee on Streets.

At a meeting of the Committee on Streets held on Friday, December 9, 1881, the following appears: * * *

Maj. Robt. Stiles appeared as attorney for the Western Union Telegraph Company in regard to removal of poles from Main Street in conformity with a recent ordinance and submitted a paper indicating the route, etc. * * *

Western Union Telegraph Co. as to poles on Main Street. On motion, it was recommended to the Council as follows: (163) Whereas, the object of the ordinance of July 16th, 1881, requiring removal of poles and posts from Main Street, was to secure the unobstructed freedom of the principal thoroughfare of the city and not to raise revenue, and, whereas, the Western Union Telegraph Co. has signified its readiness without contest to remove its Main Street line, provided another suitable route be guaranteed to it; therefore, be it resolved, that all penalties, if any, incurred by said company under said ordinance, be, and they are hereby, remitted, and the said company is hereby authorized and permitted to erect the necessary poles, the same to be symmetrical in shape, properly painted, and duly secured from falling, to convey the wires of said company through the streets of the city. A line from Main Street down Eighth to Cary, down Cary to Thirteenth Street, and up Thirteenth Street to the office of the company, on Main and Thirteenth Streets, on condition of the removal of said company's poles or posts from Main Street at its own expense within sixty days. Said poles to be erected inside of the curbstones and with as little interruption to travel and traffic as possible and under the supervision and control of the City Engineer, and

the route hereby granted to be revoked by two successively elected Councils.

Correct Copy.

FRANK T. BATES,
Clerk Engineer's Department.

EXHIBIT R, No. 2, WITH ANSWER.

Whereas, the object of the ordinance of 1881, requiring removal of poles and posts from Main Street, was to secure the unobstructed freedom of the principal thoroughfare of the city, and not to raise revenue; and, whereas, the Western Union Telegraph Company has signified its readiness, without contest, to remove its Main Street line, provided another suitable route be guaranteed to it; therefore, be it resolved, that all penalties, if any, incurred by said company under said ordinance (164) be, and they are hereby, remitted, and said company is hereby authorized and permitted to erect and maintain without disturbance by the city, a line for the transaction of its business, from Main Street down Eighth to Cary, down Cary to Thirteenth and up Thirteenth to the office of the company, on Main Street, on condition of the removal of said company's poles or posts from Main Street, at its own expense, within sixty days, and the route thus granted to be revoked by two successively elected Councils.

Correct Copy.

FRANK T. BATES,
Clerk Engineer's Department.

EXHIBIT R, No. 3, WITH ANSWER.

Richmond, Va., December 12th, 1881.

To the President and Members of the Board of Aldermen:

Gentlemen:—The Committee on Streets submit the following and ask your approval of the same:

Resolved, the Common Council concurring:

Whereas, the object of the ordinance approved July 16th, 1881, requiring the removal of poles and posts from Main Street, was to secure the unobstructed freedom of the principal thoroughfare of the city, and not to raise revenue, and, whereas, the Western Union Telegraph Company has signified its readiness, without contest, to remove its Main Street line, provided another suitable route be guaranteed to it; therefore, be it resolved, that all penalties, if any, incurred by said company under said ordinance be, and they are hereby, remitted, and said company is hereby authorized and permitted to erect the necessary poles, the same to be symmetrical in shape, pro-

perly painted and duly secured from falling, to convey the wires of said company through the streets of the city by the following (165) line: From Main Street down Eighth to Cary Street, down Cary Street to Thirteenth Street and up Thirteenth Street to the office of the company, corner Thirteenth and Main Streets, on condition of the removal of said company's poles or posts from Main Street, at its own expense, within sixty days; the said poles to be erected inside of the curbstones, and with as little interruption to travel and traffic as possible, and under the general supervision and control of the City Engineer, and the privilege hereby granted shall be revocable by two successively elected Councils.

Correct Copy.

FRANK T. BATES,
Clerk Engineer's Department.

EXHIBIT R, No. 4, WITH ANSWER.

Resolved, the Common Council concurring: Whereas, the object of the ordinance approved July 16th, 1881, requiring the removal of poles and posts from Main Street, was to secure the unobstructed freedom of the principal thoroughfare of the city, and not to raise revenue; and, whereas, the Western Union Telegraph Company has signified its readiness, without contest, to remove its Main Street line, provided another suitable route be guaranteed to it; therefore, be it resolved, that all penalties, if any, incurred by said company under said ordinance be, and they are hereby, remitted, and said company is hereby authorized and permitted to erect the necessary poles—the same to be symmetrical in shape, properly painted, and duly secured from falling—to convey the wires of said company through the streets of the city by the following line: From Main Street down Eighth to Cary Street, down Cary Street to Thirteenth Street, and up Thirteenth Street to the office of the company, corner Thirteenth and Main Streets, on condition of the removal of said company's poles or posts from Main Street at its own expense, within sixty days; the said poles to be erected inside of the curbstones and with as little interruption to travel (166) and traffic as possible, and under the general supervision and control of the City Engineer. And the privilege hereby granted shall be revocable by two successively elected Councils.

Adopted by Board of Aldermen December 12, 1881.

Concurred in by Common Council January 2, 1882.

Approved by the Mayor January 5, 1882.

A Copy—Teste:

BEN. T. AUGUST,
City Clerk.

**REPLICATION OF COMPLAINANT TO ANSWER OF
DEFENDANT TO AMENDED BILL.**

(167) Filed August Rules,
Monday August 7, 1905.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

The Western Union Telegraph Company,
a corporation duly organized and exist-
ing under the laws of the State of New
York, and a citizen and resident of said
State, Plaintiff,

vs.

City of Richmond, a municipal corpora-
tion incorporated and existing under the
laws of the State of Virginia, and a citi-
zen of the State of Virginia, Defendant.

In Equity.

The replication of The Western Union Telegraph Compa-
ny, complainant, to the answer of the City of Richmond, de-
fendant, to the amended bill filed by the complainant.

This repliant, saving and reserving to itself all and all
manner of advantage of exception, which may be had and taken
to the manifold errors, uncertainties and insufficiencies of the
said answer of the said defendant, for replication thereunto,
saith that it doth and will aver, maintain and prove its said
bill to be true, certain and sufficient in the law to be answered
unto by the said defendant, and that the said answer of the
said defendant is very uncertain, evasive and insufficient in
law, to be replied unto by this repliant; without that, that any
other matter or thing whatsoever in the said answer contain-
ed, material or effectual in the law to be replied unto, and not
herein and hereby well and sufficiently replied unto, confessed
or avoided, traversed or denied, is true; all which matters and
things this repliant is ready to aver, maintain, and prove as
this honorable court shall direct, and humbly prays as in and
by its said bill it hath already prayed.

THE WESTERN UNION TELEGRAPH CO.,
By A. L. HOLLADAY, its Solicitor.

(168) Received and filed October 16, 1905.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

The Western Union Telegraph Company,
Complainant,
 against
City of Richmond, Defendant.

To City of Richmond:

Take notice that the Western Union Telegraph Company will on Wednesday, the 27th day of September, 1905, at the offices of Addison L. Holladay, 1014 East Main street, in the City of Richmond, State of Virginia, between the hours of nine o'clock A. M. and nine o'clock P. M. of that day, proceed to take the depositions of J. C. Barclay and others, to be read as evidence in behalf of the Western Union Telegraph Company in a certain cause in equity now depending in the Circuit Court of the United States for the Eastern District of Virginia, wherein the Western Union Telegraph Company is plaintiff and the City of Richmond is defendant; and if from any cause the taking of said depositions be not commenced on that day, or, if commenced, be not concluded on that day, the taking of the same will be adjourned and continued from day to day (Sunday excepted) or from time to time at the same place and between the same hours until the same shall be completed.

Yours respectfully,

THE WESTERN UNION TELEGRAPH CO.,
By A. L. HOLLADAY, as its counsel.

Service acknowledged for the City of Richmond this 22d day of September, 1905.

H. R. POLLARD,
City Atty.

of that, taking in all of the country east of the Mississippi River and as before stated, west of the Mississippi River from New Orleans to about Orange.

6 Q. For how long had you control of this territory, as General Superintendent? A. About twenty years.

(171) 7 Q. And prior to that time what connection had you with the Western Union Telegraph Company? A. I was Assistant General Superintendent of the Eastern Division, for a period of three or four years. Prior to that I was Superintendent of a District, with headquarters at Philadelphia, for a period of about eight years.

8 Q. When did you begin service in connection with telegraph companies? A. In 1849.

9 Q. How long have you known the system of the Western Union Telegraph Company, in connection with your official duties as telegraph superintendent or operator? A. Intimately since about 1866 or '67.

10 Q. And before that had you known it more or less intimately? A. Before that the Western Union Telegraph Company did not come east of Petersburg.

11 Q. How much of the United States, at the commencement of this suit, or thereabouts, to your official knowledge, was covered by the lines of the Western Union Telegraph Company? A. The whole of the United States. Every State in the United States was very fully covered by the lines of the Western Union Telegraph Company and its offices.

12 Q. What connections were there with Mexico and South America, with those lines? A. There were connections with South America at Galveston, Texas; and with the European cables in New York State and other places.

(172) 13 Q. What were the means of connection with foreign countries, of this system? A. By the connections to which I have just referred—by ocean cables.

14 Q. How was it as to the Western Union having a system of lines in Canada and the provinces? A. The Western Union connected with lines in Canada.

15 Q. Do you know about the mileage—wire and poles of the system? A. I could not give accurate figures. I have a general knowledge of the mileage and offices, and general details, but I could not state the figures accurately, because that was not in my—

16 Q. Have you seen the figures in Article 4 of the bill, that there were about 200,000 miles of poles and cables, and about 1,200,000 miles of wire? A. Yes, sir, I have seen that statement.

17 Q. And how does that correspond with your general knowledge of the subject? A. I believe that to be correct.

18 Q. And as to the business transmitted over those—about 68,000,000 messages—does that correspond with your knowledge? A. I believe that to be correct.

19 Q. Now among the lines of this Western Union, how long have you known any within the city of Richmond? A. Since 1884.

20 Q. And have you been more or less intimately acquainted with those *lands* since that time? A. I have.

21 Q. Were they among the lines which were under your supervision as General Superintendent? A. They were.

22 Q. Have you made a recent inspection of those lines? A. Yes, sir.

23 Q. When was that made? A. Yesterday.

24 Q. Will you describe the general route of those lines in the city—I mean now, the lines of the Western Union not upon the railroad right of way? A. The Western Union lines, poles and wires are on streets in the city of Richmond from the Richmond, Fredericksburg & Potomac Railroad to Broad, at College, where there are about 40 wires; thence across Broad street and eastwardly along Broad street—(they are on the right hand side of Broad street coming into the city)—about 24 poles, carrying about 30 wires, to Broad and Adams. Under the wires of the Western Union Company there are poles carrying from three to five high tension wires. Thence east on Broad street to 8th, 17 poles, and under the Western Union wires there are other poles, carrying about seven high tension wires. Broad street is about 80 feet wide, and the sidewalk on which the poles stand is about 18 feet wide. The line continues south on 8th street to the C. & O. road, 15 poles. There (174) is also a second line of poles on Cary street, south to the C. & O. Road, 2 poles. From 8th street east on Cary to 13th street there are 10 poles, carrying about 60 wires. There are four high tension wires on poles below the Western Union wires. Along 13th street to Main there are 4 poles carrying about 8 open wires and 6 cables. From 13th and Cary, along Cary to Virginia street, there are 44 open wires and 2 cables on 3 poles. South on Virginia street to the Southern and C. & O. Railways there are 5 poles.

25 Q. That is the limit of the line? A. That is the limit of the line.

26 Q. You speak of Broad street being 80 feet wide—do you mean that is the total width, or from curb to curb? A. From curb to curb.

27 Q. And where are the poles located on this street, with reference to the curb and side-walk? A. On the side-walk next to the curb.

28 Q. What is the physical condition of this line as you saw it? A. In good order.

29 Q. And what do you say as to that line on these streets, as you have described it, interfering with the ordinary travel on the streets and side-walks, or either of them? A. There is no interference whatever with travel in the streets because the (175) poles are not in the streets. Travel is not interfered with on the side-walk, because the poles stand close to the curb and there is plenty of room between the poles and the houses, for the travel, and for a considerable increase in the travel.

30 Q. Mr. Merrihew, has your experience as a superintendent, and general superintendent, in the management of telegraph lines given you the knowledge from which you can form a judgment as to the extent of interference with the operation of telegraph lines by city officials in enforcing municipal regulations? A. Yes, sir.

31 Q. I call your attention to section 1 of an Ordinance, Exhibit No. 1 with Complainant's Bill in this case, and the provision in that section that—

“Hereafter no poles shall be erected, nor any wire or other apparatus used in connection with the transmission of electricity, be placed in position, in any street or alley of this city, until the City Engineer shall have first determined upon the size, quality, character, number, location, condition, appearance and manner of erection of such poles, wires or other apparatus, Whenever at any time the said poles, wires or other apparatus shall, in the opinion of the City Engineer, need changing in size or location, replacing, repairing, being made safe and secure, or being put in proper and suitable condition and appearance, such one of the persons so using the same (if there be more than one, as shall be selected by the City Engineer) shall immediately proceed to do such changing as to size and location, replacing, repairing, making safe and secure, or putting in proper and suitable condition and appearance, as the said engineer shall designate in writing, and all damage done to any street, by the erection of any pole, shall, from time to time, be rectified and repaired, as required by the City Engineer.”

I will ask you whether, in your experience and in your judgment, the requirements of that section would be reasonable or unreasonable, taking into account the requirements of telegraphic operation and maintenance? A. I think they would be entirely unreasonable.

32 Q. Will you state in what respects they would, in your judgment unreasonably interfere with the proper management

and operation of telegraph lines? A. I take it that the managers of telegraph companies, having had years of experience in construction, would be better qualified to determine as to the quality and character of the poles and wires and other apparatus, than would the City Engineer. The telegraph managers know better where to get poles of the proper quality, and to determine the quality of the wire required in their business, than would the City Engineer. The telegraph managers would (177) be better qualified to select the other apparatus, than would the City Engineer. Indeed, I take it that the City Engineer could have no idea whatever as to what other apparatus should be selected for use in connection with the transmission of electricity, in the general business of a telegraph company.

33 Q. Please state whether the character of the apparatus, poles, wires, &c., in the city of Richmond, would be selected by the telegraph officials with reference to the service to be performed by the whole system, or with reference only to the service in the city of Richmond? A. The whole service.

34 Q. You may state whether there would be any objection to the City Engineer having to say as to the approval of the location of poles, providing suitable location were given by means of which connection could be made with offices selected by the telegraph company? A. I would see no objection to it.

35 Q. Referring to section 4 of the ordinance in question, I call your attention to the requirement therein, as follows:

"The Committee on Streets may hereafter require any person or company owning any such poles, used for telephone or telegraph purposes, to allow any other person or company to place upon its pole, and in such positions thereon, any telegraph, telephone, or any other light current wire which may be used for the transmission of electricity, now belonging to, or that (178) may hereafter belong to, any person or company authorized by the Council to run wires in the streets or alleys, as the Committee may from time to time deem proper, and which will not, in the opinion of said committee, unreasonably interfere with the business of the person or company owning such poles, and upon such terms and conditions as may be agreed upon by said owner and any person or company desiring to use such poles; and in the event that said owner and the person or company desiring to use said poles can not agree upon satisfactory terms and conditions, the same shall be settled by three disinterested persons, one to be selected by such owner, one by the person or company desiring the use of said poles, and the third by the two persons so selected, and the terms and conditions shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which

said company or companies, respectively, shall use and occupy said poles. If the said owner shall, for thirty days after having been requested in writing to appoint its representative, fail to make such appointment, then the city engineer shall make such appointment, and the person so appointed shall have the powers he would have had if he had been appointed by the said company. If the two arbitrators, selected in either of the two manners above specified, shall fail for thirty days after their (179) appointment, to select a third arbitrator, then the city engineer shall select such third arbitrator, and when so selected he shall have the same powers he would have had if he had been appointed by the two said arbitrators. Or, if after the three arbitrators shall have been appointed in any of the modes above specified, they shall fail to settle and determine said terms and conditions within thirty days from the date of the appointment of said third arbitrator, then the city engineer shall have power to select a person who shall have power to settle and determine said terms and conditions."

I will ask you whether, in your judgment as an experienced operator of telegraph lines, that requirement would operate reasonably or unreasonably upon the management of telegraph lines in the city, subject to it? A. My opinion is that it would be objectionable to a responsible telegraph company to have wires of other persons or corporations, perhaps irresponsible, thrust upon it. There would be a liability to interruption of the circuits of the telegraph company by irresponsible workmen of other parties placing wires upon the poles, bringing them in contact with the working circuits of the telegraph company, thereby causing interruption, perhaps neglecting to give such wires the proper oversight, perhaps abandoning such wires— as (180) I have known to be the case, and leaving them there as a menace to the telegraph company's wires, and the citizens.

36 Q. You speak of these wires interfering with the circuits, and the business. Just state how that is likely to occur, and how it affects the transmission of business? A. In putting up such a wire the workmen, owing no duty to the telegraph company owning the poles, would in all probability not take the same care to avoid touching said wire being erected against the working circuits of the telegraph company, and every time such contact was made, if the wire being erected is lying on the ground, having contact with the earth, the working circuits would be grounded, entirely cutting off communication on such working circuit during the time of contact; or if the contact were only momentary possibly it would throw in false signals, making liability to error; or if the wire was drawn across two or more of the telegraph company's wires

such wires would, to use a technical term, be "crossed"—the effect of which would be to interrupt communication on as many of the wires as were thus connected together, or to throw in false signals on each of them.

37 Q. You speak of false signals being sent possibly, or of momentary grounding. If a message were being sent along that wire at that time might this change the character of that message? A. Yes, sir.

(181) 38 Q. In connection with Section 6 of this ordinance I will ask you what, in your opinion, and from your experience, would be a reasonable valuation of the space upon the poles of the telegraph company, required to be furnished to the City under that section, for the use of the City wires? A. About thirty-seven and one-half cents for each attachment; that is, 37½c. for the attachment of one wire to one pole; and 37½c. for each additional wire attached to the same pole.

39 Q. For what space of time? A. Per annum.

40 Q. Reducing that to a concrete valuation, about how much would that be per mile of wire, per year? A. I take it that in the City of Richmond there are about 40 poles to the mile; that would make it about \$15.00 per wire per mile, per annum.

41 Q. Referring to Section 6 I will ask you if it would make any difference in the management of telegraph lines, if the city official had the power to determine the whereabouts on the poles the city wires should be placed, as provided in the section, that they shall be placed in such position on such poles as shall seem proper to the superintendent? A. Decidedly.

42 Q. And what difference would it be? A. My answer is decidedly, in that the city official would probably at the outset select the top of the pole, thereby reserving for the city for all times the top cross-arm of six or eight spaces—that is, for (182) for six or eight wires—regardless of the fact that so many wires were not immediately needed. This would give you the condition of the City having the space at the top of the pole, and the telegraph company having the space below. The City would put up its one, two or three wires, leaving vacancies on the top cross-arm. The telegraph company would put up its wires below, and afterward every time the City put up an additional wire it would drag them over the wires of the telegraph company, causing more or less interruption of said wires. Whereas, if the City should take space from time to time as required, in such position as then might be vacant, only the space on the poles really needed would be used, and there would be no interruption to the working circuits by dragging wires, newly constructed, over those previously erected.

43 Q. In your answer do you refer to your experience in matters of that sort as to what has actually occurred? A. Yes, sir.

44 Q. Referring to Section 8 of said ordinance, reading as follows:

"The City Council hereby reserves the right to put at any time other restrictions and regulations as to the erection and use of said poles, wires and other apparatus used in connection with the transmission of electricity, and from time to time require such poles as it may deem proper to be removed, and the wires thereon to be run in conduits, upon such terms as the City may deem proper."

(183) I ask you whether, in your judgment and experience as a telegraph manager, the requirements in that section would operate reasonably or unreasonably upon telegraph companies? A. Entirely unreasonably, in that in my opinion it would be a virtual confiscation.

45 Q. In your experience in connection with City officials and in their requirements of the telegraph companies, state whether if they had the power given by this section they would use it reasonably, and under such conditions as the telegraph company could operate its lines successfully? A. In many cases I believe they would use it entirely unreasonably.

46 Q. And how would it be as to interference with the management and successful conduct of the business? A. It would very much hamper the conduct of the business.

47 Q. Do you know how long it would take a man, and the amount of time and labor to properly inspect the lines of poles and wires of the Western Union Telegraph Company within the City of Richmond, in order to ascertain that they were being kept in a physical condition to be reasonably safe. A. I think they could all be inspected easily in a day.

48 Q. And how often, in order to be sure that such condition was being maintained, should such inspection be made on behalf of the City? A. I should think that three times a year would be ample.

(184) 49 Q. And one day at a time, in your opinion? A. One day at a time—and three days in the year would in my opinion give ample time for inspection.

50 Q. And assuming that there are 185 of such poles, what would you say would be the annual cost of such inspection? A. I should say that it ought not to exceed twenty-five dollars.

51 Q. I call your attention to Section 28 of this ordinance, and to the following provision of that section:

"That all telegraph, telephone and electric light and power wires and cables, including feed (but excluding trolley wires), and all other appliances for conducting electricity, shall be removed from the streets, alleys and public grounds of the City of Richmond within the territory mentioned in the foregoing section within six months after the passage of this ordinance, and every individual, partnership, corporation or company owning such wires within said territory shall, within two months after the passage of this ordinance, submit to the Committee on Streets and Shockoe Creek plans and details showing the location, plan, size, construction and material of such conduits. Such plans may be altered or amended by said committee, and when satisfactory to it shall be approved, and thereupon it shall be the duty of the owner of such wires to proceed with the construction of such conduits in accordance with the plans so approved, and in a manner satisfactory to the City Engineer."

(185) I will ask you whether, in your opinion and experience, that section would operate upon the telegraph company reasonably or unreasonably in the management of its affairs and business? A. Entirely unreasonably.

52 Q. State in what respects, and why? A. In that it would take from the telegraph company desiring such construction, the privilege of selecting such material and style of construction as years of experience had taught them was the best for the conduct of their business.

53 Q. Should such construction vary in different localities, in the opinion of an experienced telegraph man? A. Not that I know of, but it might vary according to the use that was to be made of such construction.

54 Q. And how would it be as to the material—might that vary with the use? A. It might.

55 Q. Would that construction and difference in material be varied with reference to the use it made of that conduit in connection with the entire system of the telegraph company, or simply with reference to its use in a particular locality? A. Perhaps I had better explain a little my meaning. If I were engaged in building a conduit for a telegraph company in the City of Richmond, I think I would be justified in selecting one (186) material. If I were engaged in the construction of a conduit for a telephone company I think I would be justified in selecting another material. That is my answer—unless you want me to state my reasons.

56 Q. State your reasons. A. If I were building a conduit for a telegraph company, in Richmond, the ducts required would be very few in number and I would be justified in select-

ing a higher price material, giving me a greater freedom from accidents, than I would if I were building for a telephone company having a large number of wires, requiring a large number of ducts where a cheaper material would be sufficiently satisfactory. Now, illustrating—if I were to put in the cheaper material for the telegraph company, say wood or terra cotta, any workman in the streets would be liable to strike his pick into it, totally interrupting the entire service of the telegraph company until the street could be dug up and a new cable provided, perhaps, and run in. Such interruption might last a day, or longer. In the case of the telephone company, a workman coming along with his pick might strike it into a duct, but he would only interrupt a very small portion of the service of the telephone company—so that I think the telephone company might properly take the risk of a cheaper construction than the telegraph company.

57 Q. Have you had experience as manager of telephone companies, as well? A. Yes, sir.

(187) 58 Q. For how many years? A. For perhaps twenty years.

59 Q. I call your attention also to the following provision in Section 28 of the ordinance:

“The pavement of the streets and alleys wherein such conduits are laid shall be properly replaced, and shall be kept in proper repair to the satisfaction of the City Engineer, and the city shall be saved harmless from any and all damages arising from laying such conduits.”

I will ask you whether or not that requirement would bear reasonably or unreasonably upon the telegraph company, in your opinion? A. That paragraph to my mind is not definite. Does it mean that the pavement of the entire street shall be properly replaced and kept in proper repair? If so, it is manifestly unreasonable. Or, does it mean that the pavement of the streets and alleys torn up in placing such conduits shall be properly replaced and kept in proper repair, to the satisfaction of the City Engineer, &c.? If so, that would be unreasonable to require the company, after it had made proper repairs, and maintained it in proper repair for a time sufficient to prove that the proper repairs had been made.

60 Q. What is the usual requirement in that respect? A. It varies, but I think that one year would be ample. All (188) the settlement that would take place with the travel over it would certainly take place in a year.

61 Q. I call your attention to the further requirement in this Section 28:

"Such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys, and shall provide for an increase thereof to at least the extent of 30 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership or individual, directly or indirectly, without the consent of the Committee on Streets and Shockoe Creek, but the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires. After obtaining the consent of the Committee on Streets and Shockoe Creek, any other person or corporation now having wires in the streets or hereafter desiring to run wires therein, may occupy necessary and proper portions of such conduit upon such terms as may be agreed upon with the petitioner; and in case of a disagreement, upon terms to be determined by arbitration, as herewith provided."

I will ask you how that requirement would effect the operation and management of telegraph lines in such conduits, in your opinion. A. The language is not clear to me. Does it mean that each company having wires in the streets shall make (189) a conduit and bury its wires, or that one of the companies shall make a conduit for all of the wires in the street? In either case it seems to me unreasonable that a company having wires in the street shall be required to provide space in ducts for its existing wires, and thirty or more per cent. additional space, and that it should not be permitted to use any of such additional space in the conduct of its business without the consent of the city; and that it should be required to provide thirty or more per cent. of additional space and hold it, at its own cost and expense, for an occupant that may never come.

62 Q. In your experience in the management of telegraph lines, through conduits, does it happen that the lines in one duct are at times all incapacitated for service for a longer or shorter period? A. Yes, sir.

63 Q. What is deemed to be a wise precaution in the construction of conduits, then, with reference to a spare duct or ducts available for immediate use, in drawing in a spare cable or cables? A. It is always considered good construction to provide space for not only the wires already in use, but for a reasonable growth, and in addition thereto at least one duct to be held vacant in reserve, so that in case of accidents to the cable in a working duct, a new length of cable may be drawn in, between manholes, and allow that section of the interrupted (190) cable to be cut out, thereby reducing the interruption of perhaps an hundred wires—perhaps all of the wires in use in a small city like Richmond—to a minimum.

64 Q. You spoke in a former answer of this language being ambiguous or indefinite with reference to whether it required each company to build a conduit, or required one company to build a single conduit, the others having privileges in it. Taking Broad Street I wish you would indicate what would be the requirement in the conduit on that, under the provisions of this ordinance, in either interpretation of it, as you understand it; and state your reasons wherein the requirement of an increase of thirty per cent. would be unreasonable. A. If, under an arrangement between the companies, one company should construct for all, I estimate that the Western Union Company would require two ducts; the Postal Company two ducts the City one duct; high tension wires one duct or more—

65 Q. Are those all the low tension wires on the street—the Postal, the Western Union and the City? A. I don't know of any others—I have not yet finished my answer to your previous question—the high tension wires one duct or more, and thirty per cent. of all that would be about 2 ducts, making about 8 altogether. On the other hand, if each company were to construct, under the language of the ordinance the Western Union would have to construct two for itself and one for the city; the Postal would have to construct two for itself and one for the city; the high tension would have to construct one or (191) more for itself and one for the city. Thirty per cent. of the total would be about three, making 11 ducts altogether.

66 Q. You may state why you have attributed to the Western Union in each of these estimates, and also to the Postal in each of the estimates, two ducts? A. Because I take it that one duct would be sufficient for all of their working wires, and safe construction would require them to put down an additional duct, to be held vacant for use in emergencies or accidents to the first duct.

67 Q. That is under the principle that you have stated in your preceding answer? A. Yes, sir.

68 Q. Then I understand your idea is that each company should have under its own control at all times, one spare vacant duct, capable of instant use in case the cable in the duct in use becomes interrupted? A. Yes, sir.

69 Q. You have included in this estimate of the conduits necessary on Broad Street, high tension wires. Is this because it is in the power of the Committee, as you understand this section, to put into the same conduit any wires carrying any sort of current? A. Yes, and because the language seems to indicate that all the wires, high and low tension, shall go into the same trench.

(192) 70 Q. What do you say from your experience, as to the character of that construction which would put into the

same trench, and in the same conduit, wires carrying high tension currents and wires carrying low tension currents? A. I would consider it very bad construction.

71 Q. Will you state your reasons, generally? A. In case of a probable leakage of the high tension wires, such high tension wires themselves, and also the low tension wires adjacent, might be entirely destroyed. In case of a leakage from the high tension wires to the low tension cables, the high tension current would be conducted along the low tension cables into the manholes, endangering the lives of any workmen who might have occasion to work in the manholes into which the low tension cables entered. These dangers would be increased if the high tension cables should be permitted to go into the same manholes with the low tension; but I take it that that is so evident that no one would permit it.

72 Q. While on the subject of manholes let me ask you about how frequently manholes would be required for telegraph wires alone, in a conduit? A. I think one manhole to about each three or four hundred feet, or say one manhole to each (193) city block.

73 Q. And in case the conduit is to be adapted also to high tension wires—light wires particularly—how frequently would the manholes be required? A. I have had very little experience with high tension wires, but I am of the opinion the manholes would have to be much more frequent.

74 Q. In the conduct of telegraph business, where you have underground conduits, you may state whether it is desirable or undesirable that other parties than the telegraph employees, should have access to the manholes. A. I consider it very undesirable that different sets of employees should have access to the cables of the different companies, in the manholes. The best construction in my opinion would place the cables in the manholes of each company under the sole direction of the owner thereof.

75 Q. I call your attention to the language of Section 31 of this ordinance, as follows:

“No privilege as to the building and owning of said conduits shall last longer than fifteen years, at the expiration of which time the city may put such restrictions, conditions and charges as it may see fit, and shall be lawful, or may order its removal at the expense of the owner.”

I will ask you how that would operate, in your opinion, upon the management and control of telegraph properties? A. It might result most injuriously—ruinously. The conduits if built, would not be built by the telegraph company for the sole

use of the City of Richmond, but would be built in the interest of the general service of the company and of the whole country. (194) The removal, without some guarantee of previous substitute, would cut out a large section of the country from telegraphic facilities.

76 Q. If properly constructed what is the life of a conduit for telegraphic wires? A. I don't think that a definite answer can be given to that question. I have knowledge of conduits that have been in use for upwards of fifteen years, and that are apparently just as good as the day they were put down. Properly constructed conduits would last one hundred years or more.

77 Q. Is it believed to be permanent construction, when properly done? A. Yes, sir.

78 Q. You may state whether in your judgment as a telegraph manager, any telegraph company would be justified in constructing either an overhead line or a conduit line simply on a privilege of fifteen years duration? A. I think not.

79 Q. You may state whether in your judgment any telegraph company would be justified in constructing a line, either overhead or underground, with the requirement that at the end of fifteen years any restrictions, conditions and charges with respect to such line, might be imposed by either city, corporation or individual, as the city, corporation or individual might see fit? A. I think not; and municipalities take into consideration the difference between a plant constructed simply for use (195) in the municipality, and plants constructed for the general use of the country—in the first case giving a limited franchise, and in the second case the same municipalities giving an unlimited franchise.

80 Q. How is it as to subjecting telegraph companies to whatever charges any one might see fit, after a certain time? A. I think that is confiscatory.

81 Q. Speaking from experience as a telegraph manager? A. No, sir, I don't think I have ever had such a condition imposed upon me.

81 Q. But from your experience as to what might be the result? A. From my experience as to what might happen under such a condition. But as I have said before, no municipality that I have ever had business dealings with, has ever sought to impose such a condition upon me.

82 Q. With reference to Section 32 as to the \$2 per mile charge prior to January 1, 1900, and the right thereafter to charge any larger compensation, what inspection, in your judgment, would be necessary, in case the wires of the Western Union Telegraph Company were placed in properly constructed conduits? I refer to inspection by the City to ascertain that

those wires were reasonably safe? A. I fail to see how the City could make any inspection after the work was done, except as to manholes.

83 Q. Would even an inspection at the manholes be necessary in your opinion? A. Certainly not on the part of the (196) City.

84 Q. If such an inspection, even, were required, how much time would be required, and how frequent would such inspections be made? A. Assuming that there would be about 40 manholes in which the Western Union wires were placed, all of them could very easily be inspected in two days—in one day, unless there were peculiar circumstances entailing delay.

85 Q. And how many of such inspections a year? A. I should think quarterly inspections would be ample—that would be four every year.

86 Q. Eight days? A. Eight days—a reasonable cost of which would not exceed fifty dollars.

NOTE:

It is understood that the City Attorney shall have the right to cross-examine this witness, if he shall elect so to do.

(197) FRANCIS W. JONES, a witness of lawful age, having been first duly sworn upon the Holy Evangelists of Almighty God, deposeth and saith as follows:

By Mr. TAGGART:

1 Q. Mr. Jones, what is your residence? A. New York City.

2 Q. And your business is what? A. Electrical Engineer.

3 Q. Your are in the employ of what company? A. Postal Telegraph-Cable Company.

4 Q. How long have you been in the telegraph business? A. Since 1861.

5 Q. And in what capacities? A. I was line operator in 1861; cable repeater operator in St. John's, N. B., in 1867 for the Western Union Telegraph Company; operator in Chicago, 1872; Assistant General Manager of the office in 1876; general circuit manager of the Western Union in 1880. Then I had a recess from the business and went into the electrical manufacturing business for two years, from 1882 to 1884; then I became the electrician of the Bankers & Merchants Company for a short period; and for a short period the General Manager of the United Lines Company under Receiver; and in

1885 Assistant General Manager and Electrician of the Postal-Telegraph Co.

6 Q. Your experience then has been principally on the operating side, and the management of the electrical side, has (198) it? A. Almost wholly on that side.

7 Q. And not with the maintenance and construction of the lines? A. Not directly, no, sir.

8 Q. Have you examined the provisions of this ordinance, Chapter 88, of the City of Richmond, as applicable to telegraph companies? A. Yes, sir, I have read it over.

9 Q. Referring to Section 4 of this ordinance, which provides:

"The Committee on Streets may hereafter require any person or company owning any such poles, used for telephone or telegraph purposes, to allow any other person or company to place upon its pole and in such positions thereon any telegraph, telephone or any other light current wire which may be used for the transmission of electricity, now belonging to, or that may hereafter belong to, any person or company authorized by the Council to run wires in the streets or alleys, as the committee may, from time to time, deem proper, and which will not, in the opinion of said committee, unreasonably interfere with the business of the person or company owning such poles, and upon such terms and conditions as may be agreed upon by said owner and any person or company desiring to use such poles;"

what do you say, as the result of your experience, as to the desirability or undesirability, to a telegraph company or other (199) persons occupying their poles with wires—what objections are there to such occupation, as found by you from your observation? A. It has been my experience that it has been objectionable to have other wires upon the poles of the telegraph company for the reason that it gives access to employees not directly under the control of the telegraph company, to such poles, to make repairs and string wires, and as a rule causing interruption to the telegraph wires, disarrangement of the wires, and sometimes interfering with the employees of the telegraph company from making repairs upon poles where both the outside employees and the telegraph employee have occasion to repair at the same time and upon the same pole.

10 Q. What effect does such interference or contact with the wires of the telegraph company have upon the accuracy of the transmission of messages? A. Where outside wires are allowed to come in contact with the telegraph wires when working, it has the effect of diverting electric current from them,

interrupting the signals that are being sent over them for telegraph purposes, and so to that extent interrupting or mutilating the telegrams.

11 Q. And do such mutilations result in serious loss and damage to the telegraph company, at times? A. It has been very serious and frequent.

(200) 12 Q. Where the telegraph company owns the poles and fixes the conditions and terms upon which an outsider may string wires, can these objectionable features be largely overcome? A. They can be to a large extent mitigated.

13 Q. I call your attention to the provision in Section 28 that:

"Such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys, and shall provide for an increase thereof to at least the extent of 30 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership or individual, directly or indirectly, without the consent of the Committee on Streets and Shockoe Creek, but the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires" (in the same trench and conduit having different ducts).

A. In my experience there have been some serious consequences to the telegraph companies on account of contiguity of ducts carrying wires having high tension currents, and ducts carrying wires of the telegraph company. The trouble generally arises from imperfect insulation, or break down of insulation in the ducts, of the high tension system, starting fire, and so communicating to the ducts of the telegraph company, melting them, injuring the insulation of the telegraph company's wires, and so interrupting the service. That has happened frequently, and it is particularly objectionable where high tension ducts and the ducts of the telegraph company enter the same manholes. Serious troubles have arisen from explosions of gas in the manholes, and also from fires occurring in the manholes, and also from the employees going into the manholes coming into contact with the wires of the high tension system. There have frequently been known to be escapes of high tension current, by leakage of insulation, and these currents spread in all directions and at times make it quite impossible for the repairers to do anything in the manholes.

14 Q. What effect, if any, does this proximity of ducts carrying high tension currents, have upon the working of the telegraph lines? A. When they are enclosed in iron tubes the effect is negative, so far as the electrostatic or electro-magnetic

influences have to do; but there is another, very serious trouble which arises from electrolysis, which is caused by the escape of current, either from these high tension or power wires, into the earth, and from the earth into our cable tubes, and melting the sheath which encloses the insulated wires of the telegraph company, or any company operating low tension systems; and that current escapes either from the rails of their system in the street, or escapes from their leads, from imperfect insulation, (202) passing over into our system. These currents are seeking to get back to the power station of the company owning the system, and so when they leave our lead sheath they cause an excitation, which pitmarks it and causes our wires to become unserviceable.

15 Q. Assuming that under Section 28 the Western Union Telegraph Company in constructing its conduit for the accommodation of wires on Broad and other streets where its wires are located, is required to provide for all the wires on such streets, and that among such wires are wires carrying a high tension current—what would you say should be the plan of construction in order to safe-guard the telegraph plant in the best and most efficient manner: first, as to the trench; second, as to the ducts, and their location with reference to each other, and the number of such ducts. A. The ducts that are provided for the wires of the telegraph company should be placed at a considerable distance away from the ducts which are to be used by the high tension currents, and under no circumstances in my judgment should these ducts enter the same manholes. And in no case should the ducts of the high tension currents be placed over the ducts of the telegraph company's system, unless at some crossing where it was absolutely necessary, and then with the utmost precautions taken to prevent electrolitic action, and also metallic contact of high tension current with low tension system.

16 Q. Now as you say the duct should be at a considerable (203) distance, what in your opinion, in feet or inches, should that distance be? A. That depends upon the voltage of what you denominate the high tension system. If they were not exceedingly high tension they could be closer than if they were very high, in my judgment, but under any circumstances they should be removed as far as it is practicable to do so—they should be kept away. The municipality should make arrangements in the streets, if it can, consistent with what goes before, to try and keep the high tension wires on one side of the street and the low tension wires on the other. They should not be allowed on the same side of the street—except where it is impossible to do otherwise.

17 Q. If on the same side of the street what would you say was the minimum distance within which the ducts should be placed of each other for say ordinary electric lighting wires? A. I don't think that I would care to have them closer than two feet.

18 Q. Now you speak of the desirability of having the duct carrying the lighting wires below the duct carrying the telegraph wires, in any arrangement. How much lower down would you indicate they should be, in order to properly safeguard the telegraph lines? A. Well, if it is practicable, at least two feet should separate them.

(204) 19 Q. You spoke of the dangers that arise from having these wires in the same conduits. Do you refer to the experience of accidents that you have had in the operation of telegraph lines, and high tension wires in the same, or contiguous conduits? A. Yes, sir.

20 Q. What extent of experience have you had in the management and operation of such lines? A. Well, as electrical engineer of the Postal Company, the reports of all such occurrences have come to me officially from the employees of the company in charge of the various cities and sections of the country through which our wires pass, and I have also had personal observation of some cases in which damage has arisen. As an instance, we had a cable from the main underground cable which goes from 253 Broadway a distance down Broadway and then through John Street to Nassau Street; from Nassau Street down to 20 Broad Street. At a point about midway between John Street and Wall Street we had a subsidiary duct and cable passing into the cellar of a building on Nassau Street, and it passed over the conduit of the Edison Illuminating Company, they running along outside of the curb of the side-walk north and south in Nassau Street, and our wires running from West to East, over and across into the building in a cable, and the currents in some manner which I can not clearly explain, escaped from this Edison system and (205) burned our cable off, lead and all—destroyed it. The first intimation we had of it was that the service in that building, and the wires entering that building, was cut off, and on examining the matter we traced it back to the Edison system and found underneath the currents had escaped in some manner, and had sought access in a sort of channel, and in doing so it was of such volume that it melted the sheath.

21 Q. How far apart were they? A. I can not say definitely, but not to exceed fifteen inches, somewhere in the vicinity of fifteen inches I should say.

22 Q. And soil intervened? A. Soil intervened—street soil, tamped in. I could tell you of another case, which was

reported to me by our Superintendent, Mr. G. W. Ribble, of Washington, where the Postal Telegraph Company has an underground system in conjunction with electric power and trolley system. We occupied one of the ducts running south towards the Potomac River, from our office on Pennsylvania Avenue. The led sheath of this Postal cable was not only destroyed in several places by electrolytic action caused by the escaping currents of the high tension circuits, but in one or two of the manholes there were serious fires caused by those currents, which melted up our lead sheath and interrupted our entire southern circuits throughout all the Southern States, and as reported to me came very near destroying the lives of one or two of our employees.

(206) 23 Q. Do you have charge for the Postal Company of the construction of underground conduits, or is that in the charge of some other official? A. That is under the charge of another official of the company.

NOTE:

The direct examination of this witness was here concluded, with the right reserved to the City Attorney to cross-examine at some future day, if he shall so elect.

(207) JOHN C. BARCLAY, a witness of lawful age, first duly sworn on the Holy Evangelists of Almighty God, deposes and says, as follows:

By Mr. TAGGART:

1 Q. Where do you reside? A. In New York City.

2 Q. What is your business? A. Assistant General Manager and Electrical Engineer of the Western Union Telegraph Company.

3 Q. How long have you been Assistant General Manager and Electrical Engineer of the Western Union? A. Three years.

4 Q. What was your business before that? A. Electrical Engineer for the Company in New York; and before that Electrician of the Western Division; and before that, dating back to 1868 I was occupied in various positions in connection with telegraph companies—the Western Union and other companies.

5 Q. Have you had to do with the operation and maintenance, as well as the electrical department? A. I have, yes, sir.

6 Q. Have you examined this Chapter 88 of the Richmond Ordinances relating to telegraph lines? A. I have, yes, sir.

(208) 7 Q. Referring to Section 1 of that ordinance, reading as follows:

"Hereafter no pole shall be erected, nor any wire or other apparatus, used in connection with the transmission of electricity, be placed in position in any street or alley of this city, until the city engineer shall have first determined upon the size, quality, character, number, location, condition, appearance and manner of erection of such poles, wires or other apparatus."

What do you say, Mr. Barclay, from your experience as a telegraph operator and manager as to the reasonableness or unreasonableness of that provision, and how it will affect telegraph companies in the operation of their lines? A. I should say it was very unreasonable.

8 Q. What are your reasons? A. For the reason that the managers of the telegraph companies are, from their practical experience, in a better position to determine what is necessary in the construction of their lines, and in the maintenance of the lines.

9 Q. In your opinion would it be practicable to successfully operate telegraph lines of a system like the Western Union if the city engineer of each city could determine upon the conditions of poles, wires and apparatus within such cities? A. It would not be possible.

10 Q. Why? A. It would be possible in one sense, so (209) far as the government or control of the telegraph company is concerned locally, but the conditions on the through lines operated from one line center to the other, such as from New York to Atlanta, or New York to New Orleans, are different, and the City could not regulate those conditions.

11 Q. Is it necessary, in your opinion as an electrician and practical telegraph manager, that the conditions of the lines should be substantially uniform, say from New York to New Orleans, for successful operation? (I refer now to the physical conditions, apparatus, &c.) A. They should be, yes.

12 Q. Referring to Section 4 of the ordinance, respecting the placing by other companies of wires upon poles of the telegraph company, under terms and conditions determined by arbitration, what objection is there, in practical experience, to such location of wires on poles under conditions not fixed by the telegraph company. A. The most serious objection is that it gives the outsiders access to the poles—people over whom the telegraph company has no control whatever, and we have found

from practical experience that these people have made serious trouble on our wires by bringing them in contact with other wires, by crossing and grounding them, and in so doing mutilating the signals being transmitted over the line by the telegraph company, to such an extent that it has changed the character of those signals, causing errors in messages. That is the most serious objection.

(210) 13 Q. Can those objections be largely mitigated in the management of telegraph properties, where the telegraph company retains the right to determine the conditions and times of entry upon its poles, and matters of that sort? A. The Telegraph Company controls that absolutely; that is, with their own employees. An employee interrupting one of the working wires of the telegraph company during the business hours of the day, is summarily dismissed from the service.

14 Q. And in a case where no foreigner—by the exigencies of a particular locality, or other reason—is permitted to occupy the poles with the telegraph company, can the telegraph company by imposing its own conditions mitigate the dangers, to a considerable extent? A. That is only possible where they can reach the employees through the management of the other company, which is a very slow process, and entirely unsatisfactory.

15 Q. Then if I understand you, in practical operation of telegraph lines, it is deemed desirable, so far as possible, to limit the use of the poles to the company owning them? A. Yes, sir.

16 Q. You are acquainted with the location of the lines of the Western Union here in the City of Richmond? A. I am; I went over them yesterday and made an inspection.

17 Q. And what is the physical condition of those lines upon the streets? A. The physical condition is very good.

(211) 18 Q. Did you notice the location of those lines with reference to the travelled streets and side-walks? A. I did.

19 Q. Do those lines in any way interfere with the ordinary travel upon those streets? A. They do not.

20 Q. What, in your judgment, would be the amount of inspection that would be required by the city, of those lines overhead, as they stand, to insure to the city that reasonable protection to the public was being observed by the Western Union in the maintenance of the lines? A. I should think an inspection of once or twice a year, which would occupy a day each, would be ample.

21 Q. That is, for the entire line as it now stands? A. Yes.

22 Q. And that would mean an expenditure of— A. Possibly ten dollars.

23 Q. I refer you to Section 28 of the ordinance Chapter 88, and call your attention to the first provision in that section:

"That all telegraph, telephone and electrical light and power wires and cables, including feed (but excluding trolley wires), and all other appliances for conducting electricity, shall be removed from the streets, alleys and public grounds of the City of Richmond within the territory mentioned in the foregoing section, within six months after the passage of this ordinance, and every individual, partnership, corporation or company owning such wires within said territory shall, within two months after the passage of this ordinance, submit to the Committee on Streets and Shockoe Creek, plans and details, showing the location, plan, size, construction and material of such conduits. Such plans may be altered or amended by said Committee, and when satisfactory to it shall be approved, and thereupon it shall be the duty of the owner of such wires to proceed with the construction of such conduits in accordance with the plans so approved, and in a manner satisfactory to the city engineer."

I will ask you whether such requirement would bear reasonably or unreasonably upon the telegraph company in the management of its business? A. I should say that it would be very unreasonable, for the reason that in placing the wires of the Western Union Telegraph Company underground, from long experience we have found that certain materials are necessary, and if any of the city officials ordered the telegraph company to change such material, to satisfy them, the conditions imposed would be unreasonable. Another thing in that connection, the city officials might regulate the placing of the local wires—that is, the wires located locally in the City of Richmond—underground, but those same conditions would seriously interfere with the working of the through wires, for instance, between Washington and Atlanta, on which wires we handle a (212) great deal of government business; because if Washington imposed an underground ordinance, and Fredericksburg and a number of small places between here and Washington, and a number of smaller places between here and Atlanta, the result would be that we would have our wires in so much underground cables that it would be impossible to work them; and for that reason the telegraph company should have a voice in arranging such wires.

24 Q. In arranging the plan and construction of a conduit for the City of Richmond, you may state whether or not the telegraph officials would have regard principally to the general

system and general business of the company? A. They would naturally have to have.

25 Q. Would that be more important than the mere local business? A. Vastly of more importance.

NOTE:

At this point City Attorney H. R. Pollard, representing the defendant, appeared and took his seat.

26 Q. Is there a material difference in the method of construction of conduits, and the plan and material that is used by the different companies? A. There is a great deal of difference in the material used in the construction of underground conduits. Some companies will use terra cotta, and some companies will use pump log; some will use cement-lined pipe; some will use the fibre; some will use paper—and the Western Union Company as their standard uses a three inch steel pipe at all places.

27 Q. Is it material in your opinion that the control of the line material, &c., should remain in the telegraph company, in order to effectuate the best results? A. Absolutely.

28 Q. I call your attention to that part of Section 28 which provides that:

“The pavement of the streets and alleys wherein such conduits are laid, shall be properly replaced, and shall be kept in proper repair to the satisfaction of the city engineer, and the city shall be saved harmless from any and all damages arising from laying such conduits;”

and I ask you how much of the street or alley would be required to be disturbed by an ordinary conduit? A. About two feet in width, and about three feet in depth.

29 Q. What effect upon the rest of the street, if any—I mean the pavement of the rest of the street, if any—would the laying of such a conduit have? A. It would have no effect whatever.

30 Q. How long after the laying of a conduit, and the proper restoration of the street, would there be any effect upon that part where the conduit was laid? A. It would be affected (214) until the ground had completely settled, which usually takes about a year.

31 Q. *Ferring* to that part of Section 28 which provides that:

“Such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys, and shall provide

for an increase thereof to at least the extent of 30 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership or individual, directly or indirectly, without the consent of the Committee on Streets and Shockoe Creek, but the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires."

I will ask you what you would say, as an electrician, as to the safety and propriety of a conduit on Broad Street which would have ducts which would accommodate the telegraph wires and the electric lighting wires in separate ducts. A. The telegraph company would require two ducts for their wires—that is, one to be used and one to be held in reserve; the one for the city would make three; and the 30%—of course we could not put down a third of a pipe so it would be necessary to put down one pipe for the increase, making four in all.

32 Q. To provide for the low tension wires, the city's and its own? A. Yes, sir.

(215) 33 Q. Now as to the high tension wires—what would be required—for the electric lighting wires? A. Well, that would require one or more ducts—I don't know how many wires they have. I am not familiar with their wire system, but of course they would require one or more ducts—they might require ten.

34 Q. If this language requires the telegraph company to accommodate all the wires in such streets, it would require that it should provide for its own wires two, and additional ducts to the extent of how many? A. Well, they would have to put down ducts equal to four times the number they would require.

35 Q. And what do you say as to the safety of including in the same conduit ducts for the high tension and low tension wires? A. From experience that is considered very poor construction, and absolutely dangerous.

36 Q. How, from your experience and in your judgment, should those ducts and conduits be constructed—not to carry both classes of wires? A. They should be kept as far apart as possible—across the street, if it is practicable; that is, the low tension should be on one side of the street and the high tension on the other, if possible.

37 Q. And how as to occupying the same manhole? A. That is very dangerous.

38 Q. How would it be—what difference would it make (216) in the method of construction with reference to the number of manholes? A. The telegraph company would require a manhole about every three to five hundred feet; the electric light or the high tension people would require a distribution of possibly two or more manholes in each block.

39 Q. What are the dangers from the occupation of the same manhole and the same conduit, by both high and low tensions? A. The danger is that if the high tension come in contact with the low tension wires, they are liable to set fire to the building where the low tension wires enter; they are liable to destroy the lives of the people working on the low tension wires, who are not expecting to come in contact with any such thing as that; and it is impossible to put the high tension wires in the same manhole with the low tension wires with any degree of safety, for the reason that if the lineman looking after the low tension wires comes in contact with the high tension wires, it means almost instant death.

40 Q. You speak of the Western Union requiring two ducts for its own safety. What is the capacity of a duct, that is, the three inch duct that the Western Union uses, that you speak of? What is the capacity? A. The number of wires, you mean?

41 Q. Yes? A. We can put in as many as 220 telegraph wires in a three inch pipe. We do not usually put in as many as that, because in increasing the number of wires we have to decrease the size, which is not desirable.

(217) 42 Q. What is about the limit that you put in? A. The limit is about 150 wires.

43 Q. Then that would occupy one duct? A. Yes.

44 Q. And what would be the use made of the other duct? A. The other duct would be held in reserve, in case of accident to the wires in the first duct. In that case we would locate the trouble and put in a cable in the second duct, and make what we call a "cross-over," and use the new section and we would pull the old section out.

45 Q. And leave that for reserve again? A. Yes, in case we should have another accident.

46 Q. Is it deemed necessary in the construction of conduits of this size that such spare duct should be provided? A. Always.

47 Q. And that such spare space should be under the absolute control of the company owning the duct? A. Available for the company at all times.

48 Q. At any moment? A. Yes, sir.

49 Q. In the management of underground systems what objection is there to the access by others to the manholes, and the pipes through the manholes, of other than employees of the company operating? A. One of the most serious objections is this: that the underground cables, which are invariably covered with lead, are very perishable, very easily damaged, and naturally the employees of the telegraph company are (218) familiar with that and know how to handle them with-

out creating any damage. If the employees of other companies have access to those manholes, and they find the cable of the telegraph company in the way they push it out of the way. May be the next man who comes along it will be in his way, and he will push it back again, and after it has been handled two or three times the lead jacket will break, which destroys the insulation. Then the first time we have a little moisture in that manhole we burn all the wires in that cable—may be 200 or 220 of them.

50 Q. Calling your attention to Section 31 of the ordinance, that:

“No privilege as to the building and owning of said conduits shall last longer than fifteen years, at the expiration of which time the city may put such restrictions, conditions and charges as it may see fit and shall be lawful, or may order its removal at the expense of the owner.”

I will ask you whether in your judgment as an operator and manager of telegraph lines, any telegraph company would be justified in constructing either an overhead or an underground system, on a mere fifteen years privilege? A. They would not be, if they expected to remain in the business.

51 Q. What is in the telegraph world expected to be the life of a properly constructed underground system of conduits? (219) A. I should think that the life of a conduit would depend entirely upon the construction; if properly constructed it should last forever.

52 Q. Is it intended to be permanent construction? A. It is.

53 Q. You may state whether or not in your judgment as an operator any telegraph company would be justified in constructing a telegraph line in any city, subject to the provision that the city may at the end of fifteen years impose such restrictions, conditions and charges upon the telegraph company as it may see fit? A. They would not, for the reason that telegraph companies do not operate locally; they reach other cities through the City of Richmond, and for that reason, if they were chopped off here—that is, if this section of the line was cut out it would leave them without connection to these other cities beyond.

54 Q. How would it be as to the charges and costs, as affecting the possibility of their operating successfully and economically? A. I consider that clause as very unreasonable in that respect.

55 Q. With the construction of an underground system, would necessity of inspection would there be on behalf of the

city, for the purpose of ascertaining whether those wires were in a condition of safety for the public? A. There is no necessity for any inspection after the underground system has been completed. We found from experience after putting down the (220) first underground system, that it was necessary to put down a very heavy casting over the manholes, with a very heavy cover that could not under any circumstances be disturbed by the heaviest traffic that might be driven over it; and for that reason we never experience any difficulty or trouble with our manholes, and they do not require any inspection.

CROSS EXAMINATION.

By Mr. POLLARD:

1 XQ. Please state as far as you know, in what cities having 100,000 population or more, have the wires of your company been put underground, in all or a part of the territory of such cities? A. New York, Boston, Buffalo, Pittsburg, Cleveland, Indianapolis, Cincinnati, Minneapolis, St. Paul, Milwaukee, San Francisco, Los Angeles, New Orleans, Baltimore, Philadelphia—that is all I can recall.

2 XQ. What cities between 75,000 and 100,000 inhabitants have the wires underground, as far as you can name? A. I do not recall any.

3 XQ. Can you recall any that have a population less than 100,000 having the wires underground? A. No, I can not recall one that has the wires underground, with a population less than 100,000.

4 XQ. Has Atlanta the wires underground? A. No, sir.
(221) 5 XQ. You do not know of any such cities? A. I do not recall them.

6 XQ. In the cities you have mentioned, where the wires are underground, have they been so placed by order of the municipal authorities; or did the companies voluntarily go underground? A. Usually after a conference with the city people, after an ordinance had been agreed to, acceptable to both.

7 XQ. You have spoken of the difficulty in having the material, of which the conduit is to be built, being determinable by the city authorities; is that the case in any of the cities that you have spoken of? A. No, we have not experienced any trouble with any city; they have never interfered, so far as I know, with the material which we wished to use. We have always used the material we thought best.

8 XQ. Do you mean to say then that the question of material in these cities has been left to the will of the telegraph company? A. Absolutely.

9 XQ. Are you sure about this? A. I am sure as to those plants I have had anything to do with.

10 XQ. Can you now recall any city of 100,000 or less, where the telegraph wires have been placed underground? A. I don't believe that we have a city where we have our wires underground, as small a city as that.

(222) 11 XQ. You have spoken of the fact that only the space dug out in the paved street would be disturbed. What would be the condition of a macadam street in this respect? A. The same conditions would apply.

12 XQ. Do you mean to say that a trench two feet wide could be made, and the earth restored so as absolutely not to disturb the soil or pavement immediately adjacent to the trench? A. Yes, sir, absolutely—it might amount to a few inches, you know; of course we would take that for granted.

13 XQ. What is the size of the ordinary asphalt block? A. I do not quite understand the question.

14 XQ. What is the size of the ordinary asphalt block with which streets are paved? A. Do you mean the thickness of the asphalt?

15 XQ. No, I mean the size of the asphalt block? A. I don't believe that we have come in contact with asphalt blocks; we have come in contact with the solid asphalt, but not with the asphalt block. I don't know of a case where we have had any dealings with the asphalt block.

16 XQ. Then you have only had dealings with sheet asphalt? A. With sheet asphalt and with the macadam, and with the paving blocks, which I should think were about the same size as the asphalt block—I don't know.

17 XQ. You mean the granite paving block? A. The granite, yes, sir.

18 XQ. Suppose the size of a granite paving block was (223) 4 x 12, how would it be possible for a line to be drawn two feet wide which would not disturb the blocks overlapping the undisturbed soil? A. It would be impossible; you would have to remove the block—remove two blocks.

19 XQ. Which would mean removing a space greater than two feet of the pavement, would it not? A. Two feet or thereabouts.

20 XQ. It would then become necessary to restore a greater space than two feet, in a great many cases, would it not? A. Yes, it might be necessary in some cases to restore a greater space than two feet.

And further this deponent saith not.

NOTE:

By agreement between counsel, the signature of the witness is waived.

(224) C. H. BRISTOL, a witness of lawful age, first duly sworn on the Holy Evangelists of Almighty God, deposes and says as follows:

By MR. TAGGART:

1 Q. Mr. Bristol, where do you reside? A. New York.

2 Q. What is your occupation? A. General Superintendent of Construction Western Union Telegraph Company.

3 Q. How long have you been in that position with the Western Union Telegraph Company? A. Since 1902.

4 Q. And prior to that what has been your experience in telegraph construction? A. I was Superintendent of Construction of the Western Division for five years; Assistant Superintendent of Construction for the Western Division for fifteen years prior to that; Road Foreman; Assistant Foreman; gang man and messenger boy.

5 Q. So you have run the gamut of the construction department, have you? A. Yes, sir.

6 Q. What lines have you under your supervision as (225) General Superintendent of Construction? A. All of the outside lines, submarine cables and underground plants in the United States.

7 Q. Have you had your attention called to the provisions of this Chapter 88 of the Code of the City of Richmond? A. Yes, I have read it all.

8 Q. Are you familiar with the lines here in the city? A. Yes, sir.

9 Q. Have you made a recent inspection of those lines? A. Yes, sir, yesterday.

10 Q. And what is the physical condition of those lines? A. Very good indeed.

11 Q. Did you observe those lines and their location with reference to the sidewalks and traveled portions of the streets along which they are located? A. I did.

12 Q. You may state whether or not they interfere with the ordinary travel upon those street? A. With pedestrians?

13 Q. Pedestrians or other travel? A. They do not, in any way.

14 Q. I call your attention to this provision of Section 28 of this ordinance:

"The pavement of the streets and alleys wherein such conduits are laid shall be properly replaced, and shall be kept in proper repair to the satisfaction of the City Engineer, and (226) the City shall be saved harmless from any and all damages arising from laying such conduits."

I will ask you how much of the pavement, street and alley, would be disturbed in laying the conduit sufficient for the wires of the Western Union line? A. From 18 to 24 inches, depending entirely upon the kind of pavement it was necessary to remove, and whether the pavement was laid with the blocks lapped by each other.

15 Q. And how deep a trench would be required for the laying of a conduit of that character? A. Ranging from two feet below the paving to three and a half, depending upon the depths of the service pipes leading into the buildings and streets.

16 Q. You mean pipes for other purposes? A. Gas and water—they are known as service pipes generally by the street people.

17 Q. What effect would there be upon the pavement of the rest of the street? A. None at all.

18 Q. If such a conduit were laid in a trench of that character, and the earth restored properly, for how long a time would there be any disturbance or interference, or settling, or other effect on the pavement that had been removed? A. In some classes of soil there isn't any, and in others it would be a year before it became thoroughly settled and absolutely to (227) grade, from the fact that we can not always tamp every section exactly alike.

19 Q. And after a year would there be any perceptible— A. Then if there is any that is all cleared up, and from that time on there never will be any from that trench.

20 Q. Do you know what would be the cost of the construction of a conduit, over the space occupied on the streets of the City of Richmond by the lines of the Western Union Telegraph Co. sufficient to accommodate the wires of the Western Union? A. About \$16,500.

21 Q. And that would provide— A. For the two Western Union ducts.

22 Q. Two three-inch— A. Steel pipe.

23 Q. To provide for an increase of such capacity to the extent of at least 30% you would have to provide what additional ducts? A. One more duct, I should say, if I understand your question.

24 Q. Then to provide this additional duct for such increase of at least 30%, and one for the city, would involve what

additional expense to the \$16,500? A. Why, it will double it—two additional ducts will double the cost.

25 Q. To provide in such conduit for not only the two ducts for the Western Union—the two which I have already interrogated you about—but also for the high tension wires an additional duct, would involve what additional expense? (228) A. About \$9,000.

26 Q. About \$9,000 additional? A. Yes, sir; that is, for one duct.

27 Q. And to provide for an increased duct to the extent of at least 30%, for high tension purposes, would involve what additional? A. \$9,000.

28 Q. \$9,000 each, you mean? A. About \$9,000 for each additional duct.

29 Q. Now in the making of such a conduit, if you were required for purposes of safety to place your high tension ducts fifteen inches or eighteen inches away from the ducts carrying low tensions, what additional expense would that involve in the construction of the conduit? A. Well, on the basis that I have been figuring this—you mean on the same side of the street, but just removed far away—

30 Q. Yes. A. Nine or ten thousand dollars.

31 Q. In the construction of conduits for low tension wires such as telegraph wires alone, how frequently do you place man holes and are they required? A. In the settled portion of a city—I mean in the business settled portion of a city, where we would perhaps want lateral lines, up and down different streets or alleys, we would place a manhole at the intersection of prominent streets and occasionally at the intersections of alleys in a block, but where we put one at an alley in this block we would generally miss that next street intersection, and probably go to the next street intersection, ranging from 350 to 400 or 450, possibly 500 feet in some cases.

32 Q. Now if this conduit required you to provide ducts for high tension wires as well as low tension wires, what change with respect to the number of manholes would be required, and their location, in the plant? A. Well, I have not had much experience with electric lighting, but it would appear evident to me that they would require as an average two to the block.

33 Q. Two manholes to the block? A. Yes, sir, for their service.

34 Q. And what is the expense about, of a manhole? A. That varies according to the digging and the obstructions met in the street enabling you to get the proper size. An average is probably one hundred dollars.

CROSS EXAMINATION.

By Mr. POLLARD:

1 XQ. Please state if your estimates were made with reference to the construction of conduits in the underground territory in the City of Richmond? A. They were.

2 XQ. Did you definitely ascertain what that was before making these estimates? A. I don't understand your question.

(230) 3 XQ. Did you definitely ascertain what was known as the underground territory in Richmond, before making these estimates? A. I did.

4 XQ. You say you have examined the overhead construction in the city, and that you did not find that as located and maintained it interfered with the ordinary travel. I call your attention to the fact, and the same will be established at the proper time, that there are side-walks in the city not more than five feet in width, and that there are telegraph poles two feet in diameter located on these sidewalks, so that two-fifths of the width of many sidewalks in obstructed by telegraph poles. In view of this would you say that a pole so situated, that is on such a sidewalk as I have described, and of the size indicated, would not materially affect the use of the sidewalk? A. I would so state—that it would not interfere with the use of it.

5 XQ. Would not that depend on how much that sidewalk was used? A. Yes, sir.

6 XQ. If it was greatly frequented by streams of people, would not it affect it? A. Yes, sir.

7 XQ. Do you undertake to say that there are not locations of the sort I have described, where the sidewalk is frequently congested? A. I did not see any location of that kind.

(231) 8 XQ. Did you examine all the lines in the city? A. I did.

9 XQ. Did you examine the line on First Street immediately north of Broad, where there is a terminus of a suburban line of street railway connecting with the urban lines; and did you observe at that point the narrowness of the sidewalk, and the size of the telegraph post located near the corner of Broad and First Streets? A. I did not examine anything at First and Broad.

10 XQ. I do not undertake to say that the particular telegraph post referred to is a pole of your company, but I call your attention to the fact that there is a pole belonging to your company, or some other company carrying electric wires, at the point indicated. You have said, as I understand you, that you did not examine that particular locality? A. I did not.

11 XQ. Are you sufficiently well acquainted with the underground systems in the various cities of the United States, to state in what cities the underground system is wholly or partially in existence? A. Where we have underground, you mean?

12 XQ. Yes. A. Yes, sir.

13 XQ. Will you state whether your company has any underground system in any city less than 100,000 inhabitants? A. I do not recall any, no.

(232) 14 XQ. Would you know it if such existed? A. I would.

15 XQ. Would you be able to recall it and state if such was the case? A. Well, I would not like to make that statement, because I might have forgotten.

16 XQ. You mean then by saying that you would know it, you would at some time have known it? A. I would have known it, if we had had it in any place under 100,000 population.

17 XQ. You have said that the construction of four ducts instead of two could double the cost of the construction necessary for two ducts. Please say whether or not that statement ought not to be in some degree modified, inasmuch as the question of excavation would be more or less involved, and surely to have four ducts instead of two the excavation would not be doubly as great? A. It is ordinarily for our ducts doubly as great for four as it is for two.

18 XQ. Why? Do you place the ducts side by side, or do you put one duct above another duct? A. In laying that number we would lay them side by side—we would lay four side by side.

19 XQ. Well, even admitting that such was the case, would not the cost of excavation be diminished to some extent—relatively diminished to some extent, where four were laid instead of two? A. I don't see why it should, or could.

(233) Mr. POLLARD: I will not press that question, if you are unable to see the reason.

RE-DIRECT EXAMINATION.

By Mr. TAGGART:

1 RDQ. What size trench would be required for four?
A. That would depend entirely upon the nature of the soil.

2 RDQ. And you would lay them— A. Lay them flat, side by side.

3 RDQ. And the figures you have given are the result of your experience? A. They are.

And further this deponent saith not.

NOTE:

By agreement between counsel, the signature of the witness is waived.

STATE OF VIRGINIA, }
City of Richmond, } to-wit:

(234) I, O. Raymond Brown, a Notary Public in and for the City of Richmond, in the State of Virginia, do certify that the foregoing depositions of James Merrihew, Francis W. Jones, John C. Barclay, and C. H. Bristol, were taken before me, at the time and place mentioned in the caption thereof, the signatures of the witnesses to their respective depositions being waived by agreement of counsel.

Given under my hand this 14th day of October, 1905.

O. RAYMOND BROWN,

Notary Public.

Notary's fee—\$32.00.

The package and seals of the foregoing depositions opened the 27th day of November, 1906, by the consent of the solicitors of both parties, and it is consented that the depositions shall be read in this cause.

RUSH TAGGART,

Solicitor for Western Union Tel. Co.

H. R. POLLARD,

City Atty.,

Nov. 27, 1906.

Solicitor for City of Richmond.

(236) Filed March 23d, 1906.

Western Union Telegraph Company,
Complainant,
 against
City of Richmond, Defendant.

The City of Richmond, by H. R. Pollard, its City Attorney and Solicitor, comes and moves the court to grant it leave to file an amended and supplemental answer to the original and amended bills in this cause, by adding new facts and defenses to the facts and defenses set up in its answer to the original bill and likewise its answer to the amended bill of the plaintiff, on the ground that since the filing of said answers the City of Richmond has amended Chapter 88 of Richmond City Code 1899 concerning wires, poles, conduits, etc., over and under the streets, by adding to said Chapter a new section in the words and figures following:

"34. None of the obligations, burdens and restrictions of this Chapter shall, in any manner, interfere with or destroy the rights and privileges secured to Telegraph Companies which have accepted the provisions of the act of Congress of July 24, 1866."

CITY OF RICHMOND,
By H. R. POLLARD,
City Attorney and Solicitor.

CITY OF RICHMOND, } to-wit:

(237) This day H. R. Pollard, City Attorney of the City of Richmond, whose name is signed to the foregoing motion, personally appeared before me in my city aforesaid, in the State of Virginia, and made oath that he verily believes that the

statements contained in the foregoing motion are true to the best of his knowledge and belief.

Given under my hand this 22nd day of March, 1906.

R. T. LACY, JR.,
Notary Public.

To A. L. Holladay, Counsel for Western Union Telegraph Company:

Take notice that the City of Richmond will, on the 19th day of March, 1906, make the foregoing motion in the Circuit Court of the United States for the Eastern District of Virginia in the Court-Room of said court in the City of Richmond, at 11 o'clock A. M. of that day.

CITY OF RICHMOND,
By H. R. POLLARD,
City Attorney and Solicitor.

**DECREE OVERRULING MOTION TO FILE AMENDED AND
SUPPLEMENTAL ANSWER AND ALLOWING
CROSS-BILL TO BE FILED.**

(238) Entered and filed March 23, 1906.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Western Union Telegraph Company,	}	Decree.
Complainant,		
<i>vs.</i>		
City of Richmond, Defendant.		

This day came the City of Richmond, by H. R. Pollard, City Attorney, its solicitor, and filed its written motion to be allowed to file an amended and supplemental answer, and tendered to the court with said motion a draft of an amended and supplemental answer; and likewise came the plaintiff, the Western Union Telegraph Company, by A. L. Holladay, its solicitor, and objected to the granting of the said motion and to the filing of said amended answer, on the ground that the facts and defenses sought to be set up in and by said supplemental answer can only be introduced into the record, if at all, by a cross-bill, which motion of the defendant, and objection of the plaintiff, were argued by counsel.

Thereupon, and upon consideration whereof, and upon a reading of the said draft so tendered to the court, which is marked and identified as exhibit "S. A.," the court denied and overruled the said motion of the said defendant, and refused to allow said amended answer to be filed, and thereupon the City of Richmond, by its solicitor, moved the court to allow it to file a cross-bill in this cause, embodying the substance set out in the said draft of the supplemental and amended answer in (239) order to add new facts and defenses to its defenses heretofore set up in its answers filed to the original and amended bill of the plaintiff, in this cause, to the granting of which the plaintiff objected, but the court overruled said objection and granted leave to the City of Richmond to file said bill, and thereupon the said defendant filed in open court a cross-bill in this cause; and the cause is remanded to rules to be matured and process is awarded against the said Western Union Telegraph Company to answer said bill.

EDMUND WADDILL, JR.,
U. S. Judge.

Richmond, Va., March 23rd, 1906.

CROSS-BILL.

(240) Filed March 23d, 1906.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Western Union Telegraph Company,	}	Cross-Bill.
vs. City of Richmond, Defendant.		

To the Honorable, the Judges of the Circuit Court of the United States for the Eastern District of Virginia:

The City of Richmond, a municipal corporation organized and existing under the laws of the State of Virginia and a citizen and resident of said State and in the Eastern District thereof, sheweth unto the court that the Western Union Telegraph Company, a corporation duly organized and existing under the laws of the State of New York and a citizen and resident of said State, having its principal office in the State of New York and in the Southern District thereof, has heretofore filed in this Honorable Court its original and amended

bills of complaint against your orator, wherein it set forth at great length and in detail its objection to the provisions, restrictions and limitations of certain ordinances of the City of Richmond, embodied in Chapter 88 of Richmond City Code 1899 and the amendments thereof, "concerning wires, poles, conduits, etc., in, over and under, the streets," which ordinances required, among other things, that all telegraph companies maintaining overhead wires and cables along and over certain streets of the City of Richmond in certain territory known as the under-(241) ground territory should, within six months after being required so to do, remove such wires and poles from the streets and place all such wires in conduits, specifically claiming and insisting that a compliance with the said ordinance by the said company would be construed as a waiver of its rights under and by virtue of the Act of Congress approved July 24, 1866, the said company having duly accepted the provisions of the said Act of Congress. For a more particular and detailed description of the nature and character of the several allegations and charges in the said original and amended bills contained reference is hereby made to said bills; and thereupon the said company, in and by said bills, prayed that the City of Richmond might be required to answer the allegations thereof, and that its attornies, agents and servants and all others acting by, through and under its authority might be permanently and perpetually restrained and enjoined from enforcing or attempting to enforce, against the said company, the provisions and requirements of said Chapter 88 of Richmond City Code 1899, and from removing or attempting to remove from the streets and alleys of the City of Richmond the poles, wires, cables and other appliances of the said company, and from in any manner and to any extent interfering with the said company or its property, and that each and every section of said Chapter 88 and all amendments thereof and specially sections 1, 2, 4, 5, 6, 8, 9, 10, 11, 12, 13, 25, 26, 27, 28, 30, 31, 32 and 33 and the amendments thereof might be declared and decreed to be wholly unreasonable, illegal, null and void, which prayer and prayers will more fully and at large appear by reference to the said amended and original bills of complaint.

That your orator appeared and answered each of said bills and the said company filed general replications to the said answers and issue was duly joined thereon and certain proofs have been produced in the cause. But your orator further sheweth unto your Honors that since the joining of issue in the said cause the City of Richmond by and through its Council, with (242) the approval of its Mayor has adopted an amendment to said Chapter 88 of Richmond City Code 1899 by adding thereto a section which is in the words and figures following:

"An Ordinance.

(Approved December 16, 1905.)

To amend Chapter 88 of Richmond City Code 1899 concerning wires, poles, conduits, etc., in, over and under the streets, so as to add a new section thereto providing that the rights and privileges secured to Telegraph Companies which have accepted the provisions of the Act of Congress of July 24, 1866, shall not be affected by said Chapter.

Be it ordained by the Council of the City of Richmond:

1. That Chapter 88 of Richmond City Code 1899 shall be amended so as to add a new section to the end of said Chapter in the words and figures following:

34. None of the obligations, burdens and restrictions of this Chapter shall, in any manner, interfere with or destroy the rights and privileges secured to Telegraph Companies which have accepted the provisions of the Act of Congress of July 24, 1866.

2. This ordinance shall be in force from its passage."

a copy of which ordinance duly certified by the City Clerk as provided by law is hereto attached and prayed to be taken and read as a part of this bill.

Your orator is advised, believes and charges that it has a right to bring to the attention of this Honorable Court the adoption of the said ordinance to disprove the allegations made in the said original and amended bill of the said company (243) to the effect that the City of Richmond in seeking the enforcement of sections 27 and 28 of chapter 88 of Richmond City Code 1899 was inspired by a desire to deprive the said company of its rights under the said Act of Congress approved July 24, 1866, which objections are here again denied and repudiated as unfounded, as they were denied and repudiated in the answers of your orator to the said original and amended bills.

Wherefore your orator prays that it may be allowed in the proper way and at the proper time to prove and establish the adoption of the said ordinance approved December 16, 1905, and that the same may be taken and considered as disproving the allegations of said original and amended bills as to the object that your orator had in view in seeking the enforcement of sections 27 and 28 of Chapter 88 of Richmond City Code

1899; that the said Western Union Telegraph Company may be made a party defendant to this bill and required to answer the same, answer under oath however being hereby expressly waived; that process may issue; that all proper orders and decrees may be made; that all such other, further and general relief, as in the premises may be just and right, may be granted; and your orator will ever pray etc.

CITY OF RICHMOND,

By H. R. POLLARD, Solicitor.

STATE OF VIRGINIA,}

City of Richmond,} to-wit:

This day H. R. Pollard, City Attorney and Solicitor for the City of Richmond, personally appeared before me, Joseph P. Brady, Clerk U. S. Circuit Court, and made oath that the (244) statements contained in the foregoing bill, so far as based on his own knowledge are true, and so far as based on knowledge derived from others he believes them to be true.

Given under my hand this 23d day of March, 1906.

[Seal of Court]

JOSEPH P. BRADY,

Clerk U. S. Circuit Court.

(245)

AN ORDINANCE.

(Approved December 16, 1905.)

To amend Chapter 88 of Richmond City Code 1899 concerning wires, poles, conduits, etc., in, over and under the streets, so as to add a new section thereto providing that the rights and privileges secured to Telegraph Companies which have accepted the provisions of the Act of Congress of July 24, 1866, shall not be affected by said Chapter.

Be it ordained by the Council of the City of Richmond:—

1. That Chapter 88 of Richmond City Code, 1899, shall be amended so as to add a new section to the end of said Chapter in the words and figures following:

34. None of the obligations, burdens and restrictions of this Chapter shall, in any manner, interfere with or destroy the rights and privileges secured to Telegraph Companies which have accepted the provisions of the Act of Congress of July 24, 1866.

2. This ordinance shall be in force from its passage.

(246) Entered and filed June 4th, 1906.

Western Union Telegraph Company, Complainant, against City of Richmond, Defendant.	} Bill.
City of Richmond, Cross Complainant, against Western Union Telegraph Company, Cross Defendant.	
	} Cross Bill.

EDMUND WADDILL, JR.,
U. S. Judge.

Richmond, Va., June 4th, 1906.

**ANSWER OF WESTERN UNION TELEGRAPH COMPANY TO
CROSS BILL OF THE CITY OF RICHMOND.**

(247)

Filed June 4th, 1906.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

IN EQUITY.

Western Union Telegraph Company, }
Complainant, .

against

City of Richmond, Defendant.

Bill.

City of Richmond, Cross Complainant,
against

against

Western Union Telegraph Company, Cross
Defendant.

Cross Bill

The answer of the Western Union Telegraph Company to the Cross Bill of the City of Richmond.

The Western Union Telegraph Company by its attorneys, without waiving its demurrer or any proper objection to the many errors and imperfections in said cross bill of plaintiff, by way of answer thereto, or so much thereof, as it is material for it to answer, respectfully shows to the court:

First: It admits that it has filed in this court its original and amended bills of complaint, seeking to enjoin the said City of Richmond from the enforcement of an ordinance known as Chapter 88 of Richmond City Code of 1899, concerning wires, poles, conduits, in, over and under the streets of the said city, and for a full statement of the said contents of the said bill and amended bills, refers to the said bills and amended bills, the allegations whereof it here repeats and says the same and each of them are true as set forth therein.

(248) Second: It admits that the said City of Richmond appeared and answered said bills, and that this defendant filed its replication to the answer of the said city, and that certain proofs have been taken under the issues joined in the said cause. It is informed and believes that a certain ordinance set forth in the said Cross Bill of December 16th, 1905, has been adopted by the said City of Richmond, but it respectfully shows to your honor that the said amendment of said ordinance does

not relieve the said Chapter 88 of the illegal and constitutional requirements therein contained, all of which are fully and particularly set out in amended bill of complaint of this defendant filed in this cause, and this defendant here refers to and adopts the statement of said illegal and unconstitutional requirements as thus set forth and stated in its Amended Bill of Complaint as a part of this its answer to the said City's Cross Bill, as if the same were each herein set forth and repeated in full in this its answer. It further shows that notwithstanding the enactment of the said ordinance approved December 16th, 1905, it would not be possible for this defendant to proceed to take action under the said Chapter 88 of Richmond City Code '99, without subjecting itself to conditions and requirements in taking such action which would interfere with the rights and privileges secured to this defendant under and by virtue of the provisions of the Act of July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and the Constitution and laws of the United States, and this defendant therefore avers that Chapter 88 of Richmond City Code of 1899, as amended by the ordinance approved (249) December 16th, 1905, is still repugnant to said Act of Congress approved July 24th, 1866, and to the rights and privileges of this defendant under said Act and under the Laws and Constitution of the United States, as fully set forth in its Amended Bill filed in this cause.

And this defendant denies all and all manner of unlawful combinations and confederacy wherewith it is by the said bill charged, without this, that there is any matter, cause, or thing, in the said complainant's said Cross Bill of Complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, *averred* or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

RUSH TAGGART,
A. L. HOLLADAY,

Solicitors for Defendant.

RUSH TAGGART,
A. L. HOLLADAY,
Of Counsel.

UNITED STATES OF AMERICA, }
 Southern District of New York, } ss:

On this first day of June, 1906, before me personally appeared, A. R. Brewer, Secretary of the Western Union Telegraph Company, who, being by me duly sworn, deposes and says that he is the Secretary of the aforesaid corporation; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

A. R. BREWER.

Sworn to before me this first day of June, 1906.

[Notarial Seal] CHARLOTTE A. VAN BRUNT,
 Notary Public, Kings County,
 No. 2.
 Certificate filed in New York County.
 My commission expires Mar. 30, 1908.

**DECREE FILING REPLICATION OF CITY OF RICHMOND
 TO ANSWER TO CROSS-BILL.**

(250) Entered and filed November 7th, 1906.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
 EASTERN DISTRICT OF VIRGINIA.

Western Union Telegraph Co., Complainant,	}	In Equity.
<i>vs.</i>		
City of Richmond, Defendant.		
and		
City of Richmond, Cross-Complainant,		
<i>vs.</i>		
Western Union Telegraph Co., Defendant.		

This day came the City of Richmond, by counsel, and by leave of the court filed its replication to the answer of the Western Union Telegraph Company, defendant, to the cross-bill filed in this cause by the City of Richmond.

EDMUND WADDILL, JR.,
 U. S. Judge.

Richmond, Va., Nov. 7th, 1906.

REPLICATION OF CITY OF RICHMOND TO ANSWER TO CROSS-BILL.

(251) Filed November 7, 1906.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Western Union Telegraph Co., Complainant,	} In Equity.
<i>vs.</i>	
City of Richmond, Defendant.	
and	
City of Richmond, Cross-Complainant,	
<i>vs.</i>	
Western Union Telegraph Co., Defendant.	

The replication of the City of Richmond to the answer of the Western Union Telegraph Company to the cross-bill of the City of Richmond.

This repliant saving and reserving to itself all and all manner of advantage by exception, which may be had and taken to the manifold errors and uncertainties and insufficiencies of the said answer of the said defendant, for replication thereunto, saith, that it doth and will aver, maintain and prove its said cross-bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the said answer of the said defendant to the said cross-bill is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that any other matter or thing whatsoever in said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true, all which matters and things this repliant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays, as in and by said cross-bill it hath already prayed.

(252)

CITY OF RICHMOND,
By H. R. POLLARD,
City Attorney, Its Solicitor.

DEPOSITIONS FOR DEFENDANT.

(253)

Filed January 10th, 1908.

Notice of Defendant of Taking Depositions.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Western Union Telegraph Co., Complainant,	}	In Equity.
<i>vs.</i>		
City of Richmond, Defendant.		
and		
City of Richmond, Cross-Complainant,		
<i>vs.</i>		
Western Union Telegraph Co., Defendant.		

Notice of Taking Depositions.

To Western Union Telegraph Co.:

Take notice that the City of Richmond will, on Tuesday, the 27th day of November, 1906, at the offices of H. R. Pollard, City Attorney, in the City Hall, Richmond, Virginia, State of Virginia, between the hours of 10 A. M. and 6 P. M. of that day, proceed to take the depositions of Wm. H. Thompson and others, to be read in evidence on behalf of the City of Richmond, in certain causes in equity now depending in the Circuit Court of the United States for the Eastern District of Virginia, in the first above named of which the *the* Western Union Telegraph Company is plaintiff and the City of Richmond is defendant, and in the last above named of which the City of Richmond is plaintiff and the Western Union Telegraph Company is defendant, and if from any cause the taking of the said depositions be not commenced on that day, or if commenced be not concluded on that day, the taking of the same will be adjourned and continued from day to day (Sunday excepted) or from time to time at the same place and between the same hours until the same shall be completed.

Respectfully,

H. R. POLLARD,
City Attorney.

As counsel for the Western Union Telegraph Company,
I acknowledge legal service of the within notice on this 9th
day of November, 1906.

H. L. HOLLADAY,

As counsel for the Western Union Telegraph Company,
I acknowledge legal service of the within notice on this 9th
day of November, 1906.

RUSH TAGGART,
Solicitor for W. U. T. Co.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

(254)

Western Union Telegraph Company,
Complainant,

vs.

City of Richmond, Defendant.

and

City of Richmond, Cross-Complainant,

vs.

Western Union Telegraph Company,
Defendant.

In Equity.

The depositions of William H. Thompson and others,
taken before me, John G. Winston, a Notary Public in and for
the City of Richmond, State of Virginia, at the office of H. R.
Pollard, City Attorney, in the City Hall, Richmond, Virginia,
on Tuesday, the 27th day of November, 1906, at 1:30 o'clock
P. M., to be read as evidence on behalf of the City of Rich-
mond in the causes stated above depending in the said court,
pursuant to notice hereto attached.

Present: H. R. Pollard, for City of Richmond; Rush Taggart,
A. L. Holladay, for Western Union Telegraph Company.

(255) FRANK T. BATES, a witness called on behalf of the
City of Richmond, was first duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. Mr. Bates, what is your age, occupation and resi-
dence? A. Fifty-five years of age, residence 3212 East Broad
Street, Richmond, Virginia; Clerk in the City Engineer's
office.

2 Q. How long have you been Clerk in the City Engineer's office? A. Well, I have been connected with the office since 1869.

3 Q. Are you familiar with the records of the office? A. Yes, sir.

4 Q. Please examine the ledger endorsed on the back: "Record, October, 1879, Committee on Streets," and state whether or not that is one of the record books of the City Engineer's office of the City of Richmond? A. (Examining.) It is, sir.

5 Q. Please examine the proceedings of the Committee on Streets Generally, recorded on pages 166 and 167 of that book, and state when that meeting was held, and what record of the proceedings of that meeting appears to have been taken in the matter of the Western Union Telegraph Company, as to the (256) removal of poles from Main street.

Mr. TAGGART: We object to that as irrelevant and immaterial; there is no evidence of any competency as respects the Western Union Telegraph Company, and also it is not competent, as not being an ordinance of the City.

A. The date of the meeting was December 9th, 1881. The Committee meeting was held in the City Engineer's office. The following action is recorded:

"Major Robert Stiles appeared as attorney for the Western Union Telegraph Company in regard to the removal of poles from Main street in conformity with the recent ordinance, and submitted a paper indicating the route, etc."

That is on page 166. On page 167:

"Western Union Telegraph Company, as to poles on Main street. On motion, it was recommended to the Council as follows:

Whereas, the object of the ordinance of July 16th, 1881, regarding the removal of poles and posts from Main street, was to secure the unobstructed freedom of the principal thoroughfare of the city, and not to raise revenue;

And whereas the Western Union Telegraph Company has signified its readiness, without contest, to remove its Main street line provided another suitable route be guaranteed to it; (257) Therefore, Be it resolved, that all penalties, if any, incurred by said Company under said ordinance be and they are hereby remitted, and the said Company is hereby authorized

and permitted to erect the necessary poles, same to be symmetrical in shape, properly painted and properly secured, to convey the wires of said Company through the streets of the City; a line from Main street down Eighth to Cary, down Cary to Thirteenth street, and up Thirteenth street to the office of the Company on Main and Thirteenth street, on condition of the removal of the said Company's poles and posts from Main street at their expense within sixty days, the said poles to be erected inside of the curbstone with as little interruption to travel and traffic as possible, and under the supervision and control of the City Engineer, and the route hereby granted to be revoked by two successively elected Councils."

That was the report that went to the Council according to this pencil memorandum here, made by the Clerk at that time; this was his sign of its having gone to the Council.

Mr. TAGGART: Further objection is interposed to this record, in that it appears from the last statement of the witness that he has no personal knowledge of the contents of the record, (258) and that it is hearsay based upon the report of what another person has done. This objection applies to the contents of the record, and the statement as to what was done with the report.

By Mr. POLLARD:

6 Q. To what do you refer as the sign indicating that the resolution was reported to the Council? A. The Clerk of the Committee, Mr. S. B. Jacobs, always had a check mark; if he put the word "Council" following it, that represented that it went to the Council; and a cross-mark, if there was nothing afterwards, represented that it went to the City Engineer.

Mr. TAGGART: We except to this question and answer also, as being hearsay.

7 Q. Now examine the record and see whether or not, immediately under the resolution, the check mark appears and the word "Council" as well?

Mr. TAGGART: Same objection, to question and answer.

A. Both appear.

8 Q. Where is Mr. S. B. Jacobs, who you say was at that time Clerk of the Committee on Streets? A. He is dead.

9 Q. On pages 20 and 21 of the printed answer of the City of Richmond is what purports to be a communication (259) under date of December 12, 1881, addressed to the President and Members of the Board of Aldermen, and certified by you. State where the original of that document is, or ought to be? A. By reference to this printed pamphlet, Exhibit No. 3, is dated December 12, 1881, directed to the President and Members of the Board of Aldermen. The original should be in the hands of the City Clerk, if I understand you. I mean by that, the original is copied from the Street Committee's record as a recommendation to the Council.

CROSS EXAMINATION.

By Mr. TAGGART:

1 XQ. This record that you produce here of the meeting of December 9, 1881—were you present at that meeting? A. No, sir, I cannot recall that I was present.

2 XQ. You don't know anything of your own knowledge of what occurred at that meeting? A. No, sir.

3 XQ. You don't know who was present? A. Except what the record shows; I don't know of my own knowledge; no, sir.

4 XQ. And only what the record shows in regard to it? A. That is all.

5 XQ. The records were kept by another person—Mr. Jacobs? A. Yes, sir.

(260) 6 XQ. And what you have stated in your direct examination as to the signs that Mr. Jacobs adopted for showing whether a matter went to the Council or went to the City Engineer, is what he told you? A. Yes, sir.

7 XQ. And that is all you know about it? A. That is all, sir.

RE-DIRECT EXAMINATION.

By Mr. POLLARD:

1 RQ. You have been asked as to your knowledge of the persons present at that meeting. Please examine the record on page 166, and state who the record states were present.

Mr. TAGGART: I object to that as mere hearsay on his part.

A. Charles L. Todd, Chairman, and Messrs. L. L. Bass, T. H. Ellett, Monroe Ward; L. W. Crenshaw, Jr., James D.

Patton, Madison Ward; Dr. R. G. Cabell, J. M. Higgins, Jefferson Ward; J. A. Curtis, Marshall Ward; H. W. Lubbock, Jackson Ward.

By Judge HOLLADAY:

1 RXQ. You have no personal knowledge of any one of those gentlemen being present at that meeting, have you? A. No, sir, only what the record shows.

And further this deponent saith not.

Signature waived.

(261) H. M. SMITH, JR., another witness introduced on behalf of the City of Richmond, having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. Mr. Smith, please state your named, age, occupation and residence? A. H. M. Smith, Jr., age 47, occupation lawyer, residence 10 South 5th Street, Richmond.

2 Q. Were you acquainted with the late Major Robert Stiles, of this city? A. I knew him very well, I have known him ever since I was a very small boy; my earliest recollection is of knowing Major Stiles.

3 Q. What opportunities did you have for knowing him? A. He was Superintendent of Grace Street Presbyterian Sunday School, of which I was an unworthy member for a great many years. I suppose Major Stiles was possibly more intimate with my wife's family, the Gordons, than any other family in the City of Richmond. And I knew him in the practice of law before his death in a slight way, didn't see a great deal of him in the practice of law. I knew Major Stiles (262) very well, I never failed to talk with him if I met him on the street.

4 Q. Did you ever see Major Stiles write? A. Yes, often.

5 Q. Are you sufficiently acquainted with his handwriting, do you think, to recognize it when you see it? A. I would have been afraid to say yes to that question unqualifiedly except for the fact that you showed me a paper which I recognized at once to be so unmistakably in his handwriting that I feel I

would be able to say I would recognize his handwriting if I saw it. It all comes back to me, I mean, so plainly.

6 Q. Please examine the paper now handed you, which is Exhibit No. 2 with the defendant's answer to the original bill of complaint in this case, the Western Union Telegraph Company case, and state whether or not that paper is wholly or partially in the handwriting of Major Robert Stiles; and if not wholly in his handwriting, what part is in his handwriting and what not? A. I have not looked at the marks to see what the exhibit is, but the paper which I now hold in my hand is, in my judgment, in Major Stiles' handwriting, except the last line and a half, beginning "and the route thus granted" to the end, is not, in my judgment, in his handwriting.

(263) 7 Q. Give all of the language of the paper which you do not think is in his handwriting. A. "And the route thus granted to be revoked by two successively elected Councils;" this part is not in his handwriting; the balance is, in my judgment.

8 Q. State whether or not the paper you refer to is the only written document contained in the cover endorsed "Western Union Telegraph Company vs. City of Richmond, Exhibits No. 1, 2, 3 and 4, filed with the answer of the defendant?" A. It is the only written paper, since you have called my attention to it.

9 Q. What are the other papers within the same cover? A. There are three other papers, typewritten, two of which are signed by Frank T. Bates, Clerk, Engineer's Department, and one signed Ben T. August, City Clerk.

10 Q. On the back of the paper which you identified as in the handwriting of Major Stiles with the exception stated, is an endorsement in these words: "Proposed action as to granting telegraph company a permanent route off Main street;" state in whose handwriting that endorsement is. A. It looks as if it is in Major Stiles's handwriting, I would like to look at it a little more carefully. (Examines.) I would say that is in Major Stiles's handwriting also—yes, unmistakably.

CROSS EXAMINATION.

By Judge HOLLADAY:

(264) 1 XQ. Did you observe that there are repeated erasures on the face of the paper to which you have referred? A. Yes, sir, in pencil, I notice. Yes, sir, in pencil I notice there are two, and in pen one. The word "permanent" in the ninth line from the bottom, and "or lines" in the same line are both erased by pencil, lines are drawn through those three words in

pencil. The words "a permanent" on the eighth and ninth lines from the top are drawn through in ink.

2 XQ. Did you ever see or hear of this paper until you came in the room a few minutes ago? A. I never did, and I don't know now what it is; I haven't even read it.

And further this deponent saith not.

H. M. SMITH, JR.

(265) W. H. THOMPSON, another witness introduced on behalf of the City of Richmond, having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. Mr. Thompson, state your age and occupation and where you reside. A. Forty-eight years old, City Electrician, residence 1106 West Main Street, Richmond.

2 Q. How long have you been City Electrician? A. Virtually I have been City Electrician for 22 years.

3 Q. What training have you had for the technical knowledge necessary to intelligently discharge those duties? A. I have grown up with the electric interest of Richmond from its birth, practically from when we had really nothing in the city electrical except one or two poles belonging to the telegraph company, and that practical experience has taught me to master the practical applications of electricity as applied to the City of Richmond.

4 Q. Have you studied electricity? A. Yes, sir.

5 Q. What positions have you held in associations that have considered electrical matters and appliances? A. I have held the position of executive officer, of the Executive Committee, in the Association known as the International Association (266) tion of Municipal Electricians, and have also occupied the position of President of that Association.

6 Q. Who are eligible to membership in that Association? A. People engaged in the electrical business who are actually working for cities.

7 Q. What is the number of the membership ordinarily, and how often does the Association meet? A. It meets once a year; I think the membership is somewhere in the neighborhood of 175 or 200.

8 Q. How long were you President of that Association? A. Twelve months.

9 Q. Have you held any other position in connection with it? A. I have been a member of the Executive Committee ever since the organization was created.

10 Q. Are you still a member of the Executive Committee? A. Yes, sir.

11 Q. Have you recently attended a meeting of that body? A. Yes, sir, the last meeting, held in New Haven last August.

12 Q. Give some idea of the questions considered by that body.

Mr. TAGGART: We enter an objection to that, as wholly immaterial and irrelevant.

A. We take up all questions in regard to the management of the electrical affairs of a city—poles, underground construction, aerial wires, danger from high current wires, all dangers pertaining to a city from electrical reasons.

13 Q. Are you acquainted with the limits and bounds of the territory known as the underground territory in Richmond? A. Yes, sir.

14 Q. Have you a map that will show that territory, if so, please file it? A. Yes, sir, I have. (Exhibits map.) The blue line indicates the boundary line of the underground district.

Said map is here filed as Exhibit "Thompson No. 1."

15 Q. Will you please trace it? A. Yes, sir. It runs on Broad street from the western side of Adams street to the eastern side of Eleventh street; on Bank street from the western side of Ninth street to the eastern side of Twelfth street; on Main and Cary streets from the western side of Seventh street to the eastern side of Fourteenth street; on Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth streets from the northern side of Broad street to the southern side of Cary street.

16 Q. About what proportion of the territory now within the corporate limits is comprised within the territory described by you as constituting the underground district? A. Oh, I suppose about one-tenth, I reckon, sir; it is a very small area in (268) there, about three times the size of the Capitol Square.

17 Q. By what ordinance of the City of Richmond is this underground territory created, if you remember?

Mr. TAGGART: We object to that, as the ordinance is the best evidence.

A. It is embodied in Chapter 88 of the City Code.

18 Q. What progress has been made by the companies maintaining electrical wires within the underground territory towards complying with the city ordinance requiring the removal of their wires from poles and placing them in conduits within said territory?

Mr. TAGGART: We enter an objection to that, as wholly immaterial and irrelevant.

A. Quite an extension of the underground construction is added each year by the various companies. The Southern Bell Telephone & Telegraph Company have extended their service; the Richmond Passenger & Power Company have extended their service, the City has extended its service, and I believe that is all of them that have underground service.

19 Q. State whether or not the Postal Telegraph-Cable Company is not now placing its wires underground, and has recently been doing it?

Objected to as wholly immaterial.

A. Yes, sir, they have made elaborate preparations; they (269) have got down their ducts and everything is ready to pull the cables in.

20 Q. Then state if, within the underground district, the numbers of the overhead wires have been greatly diminished by the electrical companies removing their wires to conduits? A. Yes, sir. Each year shows a vast improvement in this line; the wires are continually being taken down and put underground from overhead.

21 Q. Mr. Thompson, do you feel qualified to state, by reason of your study and experience, the desirability of wires being placed underground in cities of the size of Richmond?

Mr. TAGGART: We enter an objection to that question; it is immaterial what the witness' feelings are.

A. Yes, sir, I think it is a public necessity for all wires to go underground.

By Mr. POLLARD:

22 Q. Why do you think so?

Mr. TAGGART: We object to the question as incompetent, immaterial, and wholly irrelevant.

A. Because the recent sleet storms in the city here within the last twelve months have demonstrated that beyond the shadow of a doubt.

By Mr. POLLARD:

(270) 23 Q. Have you any photographs showing the condition of the poles and wires in the recent sleet storms to which you have referred, if so, please file them? A. Yes, sir. I now hand you a photograph showing the Western Union's wires in front of Murphy's Hotel, at Eighth and Broad, covered with sleet from a sleet storm on Sunday, December 17th, 1905.

Said photograph is filed, marked "Thompson No. 2."

Mr. TAGGART: We note an objection to the introduction of the photograph, as wholly immaterial, irrelevant and incompetent.

A. (continued) I file herewith a similar photograph showing destruction of overhead wires by the same sleet storm.

Mr. TAGGART: Same exception.

Said photograph is here filed, marked "Thompson No. 3."

A. (continued) Also a photograph showing the actual falling of poles and wires together, making it a menace to both people and property.

Said photograph is here filed as "Thompson No. 4."

Mr. TAGGART: Same exception.

Q. Under what other conditions, if any, does the presence of overhead wires in the streets constitute a menace to life and property?

Mr. TAGGART: The question and any answer are objected to, as asking the opinion of the witness with no qualification shown.

(271) A. By their becoming afoul of other wires and impeding the progress of firemen while in the discharge of their duty fighting fires, such as is shown by the following photograph of a fire we encountered in the Chesapeake & Ohio building, Eighth and Main streets, which made it almost impossible to raise a

ladder at the fire; which photograph I file with the notary. (See Exhibit "Thompson No. 5.")

Mr. TAGGART: We except to the answer and to the photograph also, as immaterial, irrelevant and incompetent.

A. (continued) I also file this photograph, showing a view of the fire known as the Meyers' fire, Foushee and Broad streets, where the falling wires of the telephone and the Western Union Telegraph Company's wire caused the stoppage of traffic for hours and hours, the wires coming in contact with trolley wires.

Photograph filed and marked "Thompson No. 6."

Same objection by same counsel to the introduction of the photograph and also to the answer.

25 Q. What were the dates of the two fires last referred to? A. I don't think I can tell you exactly; it is on file, in my evidence in the Postal Telegraph-Cable Company's case.

26 Q. Speaking of the fire occurring at the Chesapeake & Ohio building, or offices, at the corner of Eighth and Main streets, has there been at that locality, since that fire, any other conflagration, or threatened conflagration, caused by the crossing of wires?

Mr. TAGGART: We enter an exception as to that, as asking the opinion of the witness as to the cause of the fire.

A. Yes, sir, within the last sixty days they had an accident down there on the railroad, which broke some of the wires down and some of the poles down, causing the electric light and telegraph wires to become afoul of each other, thereby burning out the instruments in a branch office of the Western Union known as the Chesapeake & Ohio office at Eighth and Main.

27 Q. Did you personally make an inspection of the situation at the time referred to? If so, under what circumstances? A. Yes, sir. The foreman of the Chesapeake & Ohio branch of the Western Union Telegraph Company called me up by telephone at my residence, and asked me to hurry down there and compel the electric light company to do something to avoid further damage in his office, stating that his whole office was on fire and the instruments were all burned up right and left. I hurried to the scene and gave the proper instructions to the electric light people, who were doing at the time all they could

to remedy the trouble, and stayed on the ground until the foreman, Mr. Talley, told me everything was clear.

Mr. TAGGART: We enter an objection as to the cause of the (273) Chesapeake & Ohio fire being introduced in that manner, as incompetent and irrelevant.

28 Q. What was the name of the superintendent of the Western Union Telegraph Company's branch office, to whom you have just referred as having telephoned you? A. He is an officer of the Western Union Telegraph Company directly; he is known as Superintendent of Line Construction of the Chesapeake & Ohio, which is, in fact, a branch of the Western Union system.

Judge HOLLADAY: Same exception.

29 Q. I asked for his name. A. I can't give you his initials, sir; his name is Mr. Talley.

30 Q. State whether or not there have been recent occurrences in this city showing that the presence of the Western Union Telegraph Company's overhead wires in the underground district have not only endangered life but caused death?

Mr. TAGGART: Objected to as calling for the opinion of the witness, and as immaterial and irrelevant.

A. We have had a good many minor cases. The most serious was that of the killing of one of our brave fireman some little while back, by coming in contact with one of the Western Union wires, in the discharge of this duty, the said wire being in contact with a high potential wire nearby the scene. I have (274) some photographs I wish to file concerning that accident. I now hand you this photograph.

Said photograph is filed and marked "Thompson No. 7."

Mr. TAGGART: Objection is made to the answer, and also to the question, and to the introduction of the photograph, as wholly immaterial, irrelevant and incompetent.

A. (continued) The photograph shows a trusted lineman employed by the City pointing to the contact between the Western Union Telegraph Company's wire and a high potential wire belonging to the Passenger & Power Company, both wires being supposed to be insulated. The exact locality was at Eighth and Broad streets. The contact was such that it carried the high

potential current from the Passenger & Power Company's wire at this point, over the wire of the Western Union Telegraph Company, to the point at which the fireman lost his life.

31 Q. State where that point was.

Mr. TAGGART: Same objection and exception.

A. A building on the north side of Broad street between Sixth and Seventh, known as the Evening Journal Building. This photograph I filed ("Thompson No. 8") shows the same lineman holding the two Western Union wires on top of the roof of the Journal building—the wire had burnt in two from an overcharge of current from the Passenger & Power Company's wire, the Western Union wire being partly grounded (275) at this point.

Mr. TAGGART: Same objection and exception.

A. (Continued) This photograph I file, showing a burn on the fireman's hand, caused by contact with that Western Union wire.

Said photograph filed and marked "Thompson No. 9."

Mr. TAGGART: Same objection and exception.

32 Q. Please state what was the name of the fireman who lost his life by the accident to which you have just referred?

Mr. TAGGART: Same exception and objection.

A. Mr. Eugene Wright, fireman of Engine Company No. 3, Richmond Fire Department.

33 Q. How do you know that it was a Western Union Telegraph Company wire that came in contact with the high potential wire of the Richmond Traction Company and caused the death of this fireman?

Mr. TAGGART: Same exception and objection.

A. Because, sir, the death of this man led me to investigate the cause of his death, and in tracing the wire from the Journal Building back towards the office of the Western Union, I soon discovered the point of contact.

34 Q. Is it or not your business to keep the run of the ownership of wires on the streets of the City of Richmond?
A. Yes, sir; I am the supervisor of everything owned and controlled by the City of Richmond, electrical.

(276) 35 Q. Could the accident to which you referred have happened if that wire of the Western Union Telegraph Company had been underground, as required by the ordinance?

Mr. TAGGART: Question and answer excepted to, as asking for the opinion of the witness, as incompetent and irrelevant.

A. No, sir, if the wire had been underground, the accident would not have occurred, in my opinion.

36 Q. You say in your opinion; is it not clear that it could not have happened?

Mr. TAGGART: The question is objected to as leading, incompetent, irrelevant and immaterial.

A. No, sir, it could not have happened.

37 Q. Why?

Mr. TAGGART: Same objection.

A. Because the wire would have been safely out of the way by putting it in a conduit under the street; it would not have been subject to interference from storms, sleet, high winds, etc.

38 Q. State whether or not the presence of these wires, as they are located in Richmond, not only seriously impedes the operation of the fire department, but, in some instances, the escape of inmates of houses?

Mr. TAGGART: Same objection, and also as leading.

A. Yes, sir; in certain localities of the city the wires are (277) so thick you can hardly fire a bullet through without hitting one of them. In case of fires in those houses, it would be almost impossible to raise ladders to rescue people suffering from smoke or fire.

39 Q. Have you any photographs showing such condition, if so, file them?

Mr. TAGGART: Same objection and exception.

A. I file this photograph showing the conditions at Murphy's Hotel—telegraph wire, etc., surrounding it, which would seriously impede the operation of the fire department.

Said photograph is filed and marked "Thompson No. 10."

Mr. TAGGART: Same objection and exception.

A. (Continued) I file this photograph (marked "Thompson No. 11") showing the wires in the alley in the rear of Everett Wadley's store on Main street, telegraph wires seriously interfering with the functions of the fire escape, making it impossible to lower that fire escape in case of emergency.

Mr. TAGGART: Same objection and exception.

A. (Continued) I file this photograph (marked "Thompson No. 12") showing the condition of the wires on Broad street between Sixth and Seventh, in what is known as the dry goods district—large stores, etc.

Mr. TAGGART: Same objection and exception.

39 Q. On the photograph last filed by you I find six cross-arms; to whom do this particular pole and those cross-arms (278) belong?

Mr. TAGGART: Same exception and objection.

A. The pole, cross-arms, wires and fixtures all belong to the Western Union Telegraph Company, and are located on Broad street between Sixth and Seventh.

40 Q. State whether or not that is one of the most public thoroughfares in the City of Richmond, where great crowds of people are constantly passing and repassing?

Mr. TAGGART: Same objection and exception.

A. Yes, sir, that is one of the most dangerous points where we look for accidents from falling wires.

Mr. TAGGART: We object to the answer as not responsive to the question.

41 Q. Is not that about the center of the retail district of the City of Richmond? A. Yes, sir.

Mr. TAGGART: Same objection and exception to question and answer.

42 Q. File any other photographs you have showing the condition of the wires. A. I file this photograph showing the condition of the wires at Cary and Thirteenth streets.

Said photograph is filed and marked "Thompson No. 13."

Mr. TAGGART: Same exception and objection.

A. (Continued) I file this photograph (marked "Thompson No. 14") showing, within a block of the scene of the last (279) photograph, where the falling of an innocent low potential wire caused the wholesale death of two horses, by its coming in contact with a trolley wire.

Mr. TAGGART: Same objection and exception.

A. (Continued) I file this photograph (marked "Thompson No. 15"), of south Thirteen street between Main and Cary, showing the huge telegraph poles owned by the Western Union Telegraph Company, and owing to the narrow sidewalk they occupy almost one-third of the sidewalk.

Mr. TAGGART: Same objection and exception.

43 Q. State whether or not it becomes your duty, as City Electrician, to have an inspection made and to receive at your office complaints about imperfect electrical conditions in the city?

Mr. TAGGART: Same objection and exception.

A. Yes, sir. I have several subordinates in my office, and the duty of one of those gentlemen is to inspect the interior wiring of buildings. Recently I have had this officer make a house to house inspection of conditions in the city, and I file these deficiency slips of the defective work he found of the Western Union Telegraph Company.

Said slips, filed as stated, are marked "Thompson No. 16."

Mr. TAGGART: Objected to as hearsay, wholly immaterial, irrelevant and incompetent.

A. (Continued) These are reports of wires, call boxes, etc., some of which I personally inspected myself.

(280) 44 Q. In what did the imperfections there mentioned consist?

Mr. TAGGART: Same objection and exception.

A. We found at Moncure & Company, 20 South Thirteenth St., no protection on the Western Union call service.

Mr. TAGGART: These are all under the same objection?

Mr. POLLARD: Yes, sir.

A. (Continued) We found three different deficiencies on this slip, all pertaining to no protection from high potential wire.

45 Q. What do you mean by no protection from high potential wires?

Same objection and exception.

A. I mean what is commonly called the fuse-protector that goes on the building just where the wire enters; that has nothing to protect the building in case the wires are crossed over trolley wires or high potential wires.

46 Q. If the Western Union Telegraph Company's wires were in conduits, that lack of protection would not be a menace, would it?

Same objection and exception.

A. Not absolutely necessary.

47 Q. Would, or not, the danger be greatly lessened?

Same objection and exception.

A. Yes, sir, much lessened.

48 Q. Is it practicable to keep wires entirely insulated, so that if accidents occur by a low potential wire coming in contact (281) with a high potential wire, the current would not be conveyed?

Mr. TAGGART: Same objection and exception.

A. I think this was clearly demonstrated in the death of the fireman stated some little while ago in my evidence—where two wires were insulated, yet they had the effect of killing the fireman.

49 Q. Then insulation such as is used is not a preventive against the flow of current from a high potential wire along a telegraph wire when they come in contact?

Same objection and exception.

A. Not in wet weather, sir.

50 Q. Now go on with those slips.

Same objection and exception.

A. Almost all of those slips refer to no protection on Western Union call wires, contact with earth, etc.

Mr. TAGGART: Same objection and exception.

A. (Continued) After reading them over, I think they are very lucky in not burning the city up with all of those deficiencies in the heart of the city.

Mr. TAGGART: The answer is objected to as wholly immaterial, irrelevant, and an expression of an opinion.

51 Q. Mr. Thompson, you testified at large in the case of the City of Richmond against the Postal Telegraph-Cable Company, lately pending in the Supreme Court of Appeals of Virginia. Do you remember the purport of your evidence in that (282) case, I mean in a general way?

Same objection and exception.

A. Yes, sir, I remember my evidence.

52 Q. Please state whether or not you have seen any reason to modify or change what you there stated?

Mr. TAGGART: Objected to as immaterial and irrelevant.

A. I have seen no reason to modify it, but I have seen great reason to multiply it.

53 Q. Is there any other statement that you wish to make in this case? A. No, sir. I believe the telegraph company realizes it is to their advantage to get the wires off the streets, but, like all corporations, they like to be a little stubborn.

Mr. TAGGART: We object to the answer as not responsive and irrelevant.

54 Q. Mr. Thompson, have you made any inquiry as to the advantages that were realized at the time of the great Baltimore fire by having their wires underground?

Mr. TAGGART: We enter objection to that, as immaterial, irrelevant and incompetent.

A. Yes, sir. I had a conversation with the Superintendent and asked him what was the extent of the damage to his underground system after the fire, and he said it was practically nothing the worse, that the wires were intact and working with

the exception of a few fire boxes burned down in the burnt district.

(283) Mr. TAGGART: The answer is objected to as purely hearsay.

A. (Continued) I was on the ground and saw those things myself. I was sent there by our Fire Commissioners to offer the city my services and the use of electrical appliances, and I had the pleasure of inspecting the whole district, being escorted over the ruins before they were cold by a military officer for that purpose.

55 Q. I hold in my hand what purports to be International Association of Municipal Electricians, Tenth Annual Report, and I find on page 58 of that book the following:

"The vitrified clay conduit is the one most used and it is the best practice for all purposes. The method generally employed is to first lay a four inch foundation of concrete, then the ducts, carefully aligned, then three or four inches of concrete above and around to afford protection from mechanical injury. There should be a fall of one foot in two hundred and fifty, so that no water will remain in the conduit."

Do you agree in this statement that the vitrified clay conduit is the one most *use* and the proper practice?

Mr. TAGGART: We make objection to that, as an incompetent method of getting a report that is not competent upon the record, and also as asking the opinion of the witness on a (284) question on which he is not qualified, and as wholly immaterial and irrelevant, and also as leading.

A. The conduit spoken of there in that report is universally used, and especially used in Richmond, both by the telephone company, the Postal Telegraph Company, and the electric light company.

56 Q. What is used by the Western Union for its conduits?

Mr. TAGGART: Objected to as wholly immaterial and irrelevant.

A. The same class of conduits.

57 Q. Your evidence on this point is challenged on the ground that you are not competent to speak as an expert. Have

you studied the question of conduits and their construction?
A. Yes, sir, I have.

58 Q. What has been the extent of that study? A. Five years ago the City of Richmond took up the subject of putting its wires underground, thinking perhaps that would be an excuse for the other companies to follow, as the excuse had always been that the city had its wires overhead; and I went pretty deep into the subject, looking up the method in other cities, and I found that is the universal plan, to use vitrified clay conduits in all cities.

Mr. TAGGART: We object to the answer as hearsay and incompetent.

59 Q. Do you, or not, consider it the best?

Mr. TAGGART: Same objection to question and answer.

(285) A. It is the best, the cheapest and best.

60 Q. What wires are overhead in the City of Richmond in the underground territory, other than the wires of the Western Union Telegraph Company? A. We have a few wires left of the Passenger & Power Company; the majority of them are Western Union wires; and a few also of the Traction Company wires, known as the feed wires of the trolley system.

61 Q. You speak of the Passenger & Power Company's wire; what are the character of those wires, and for what are they used? A. Lighting purposes, furnishing commercial light, and power for stores, residences, etc.

62 Q. Is that company complying from time to time with the city requirements?

Mr. TAGGART: We object to that question as asking for the opinion of the witness, incompetent and immaterial.

A. We issue no permits for overhead wires in the underground district, we have the additional service put in, it means that those wires must go underground. We will not even grant them a permit to add one additional light to a service that is already installed unless the wire is put underground, when it is in the underground district.

63 Q. You have spoken of the wires of the Richmond Traction Company; is it not a fact that the Richmond Passenger & Power Company also has trolley wires overhead? A. They (286) have trolley wires overhead, which is the custom, by law, but the feed wires are required to go underground.

64 Q. If the trolley wires were placed underground, what change in mechanical construction would be necessary with the street-car system?

Mr. TAGGART: Objected to as wholly immaterial and irrelevant.

A. It would require an enormous sum of money to change the present system to that of underground, and it is not practicable nor desirable in a city the size of Richmond.

65 Q. You mean the underground trolley system for the operation of cars? A. Yes, sir.

66 Q. If the wires of all the electric companies, other than trolley wires, were placed underground, would the trolley wires be a serious menace to life and property by being overhead?

Mr. TAGGART: Objected to as wholly immaterial and irrelevant.

A. No, sir, not from the fire department's standpoint, for we have what we call the emergency signal, which we use over our telegraph system, on receipt of which at the power station the current on those wires is cut off in whatever section of the city the fire might happen to be, and thereby we can control the situation and have done it. At the time of the Meyers fire, the Western Union Company was the first one to squeal for those (287) wires to be cut off; their service was not only damaged in Richmond, but it was squeezing its way towards Washington; every little hamlet was feeling the effect of those heavy current wires in Richmond.

Mr. TAGGART: We note an objection to the answer as not responsive to the question, and also hearsay.

67 Q. What effect has the pending injunction in this suit upon the safe and efficient discharge of the duties that pertain to your position as City Electrician, and Superintendent of the City Fire and Police Telegraph?

Mr. TAGGART: Objected to as totally incompetent and irrelevant and wholly a matter of opinion.

A. The wires and poles of the Western Union you have reference to?

68 Q. Yes, sir; that injunction is against the city's interfering with them. A. I take it that it puts me in a position where I have no right to interfere with conditions, as I find

them in their construction—rotten poles and falling wires, I have no authority to raise the wires.

69 Q. Suppose, for the sake of argument, that one of the poles of the Western Union Telegraph Company becomes dangerous to pedestrians on the street, what power have you in the premises?

Mr. TAGGART: Objected to as calling for a matter of opinion, and immaterial and irrelevant, and answer objected to.

(288) A. I haven't any power to compel those people to do anything, as I consider it, although they are in bad shape to the city, and have been for some time.

70 Q. Can you give any particular instance where their poles have been found to be in a dangerous condition?

Mr. TAGGART: Some objection to question and answer.

A. The pole in front of Murphy's Hotel on Eighth street, and one on Eighth street between Grace and Franklin, wires here and there within a few inches of high potential wires—conditions existing at the minute I am telling you about it now. Throughout the city accidents of the character of the one that happened to the fireman at the Journal Building are liable to happen to any other fireman at any time of the day, on account of those wires.

71 Q. What recourse have you had in order to have defective and rotten poles renewed?

Mr. TAGGART: Same objection to question and answer.

A. None whatever, they are standing up there a menace to the public, held by the wires only.

NOTE: The cross examination of this witness is postponed until the following day.

(289) BEN T. AUGUST, another witness introduced on behalf of the City of Richmond, having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. Mr. August, please state your age, occupation and residence? A. Richmond, Va., 61, City Clerk.

Q. How long have you been City Clerk? A. Well, a great many years, I don't remember the number.

3 Q. I now hand you a printed copy of the answer of the City of Richmond to the bill of complaint of the Western Union Telegraph Company, and also a printed copy of the answer of the City of Richmond, and the amended bill of the complainant in the same suit, and request that you will examine the print on pages 5 in the first copy and 4 in the last named copy, which purports to be a copy of an ordinance of the City of Richmond, entitled "An Ordinance to allow the American Union Telegraph Company to erect telegraph poles and run wires along certain streets, approved March 17, 1880," and state whether or not the prints there made are copies of an ordinance adopted by the Council of the City of Richmond and printed officially in "Ordinances and Resolutions passed by the (290) City Council of the City of Richmond between the 1st of July, 1878, and the 1st of July, 1880."

Mr. TAGGART: We enter objection to the testimony, as not being the proper method of proving an ordinance of the city.

A. (Examining) Yes, sir, they are.

4 Q. I now hand you, to identify, and to be filed as a part of your answer, "Ordinances and Resolutions passed by the City Council of the City of Richmond between the 1st day of July, 1878, and the 1st day of July, 1880, published by authority of the Council," which, if you identify as such, please file as a part of your examination.

Judge HOLLADAY: Excepted to as illegal and incompetent testimony, and also as encumbering the record with irrelevant matter and ordinances having no connection with or relevancy to this controversy.

A. Yes, sir.

Said ordinances and resolutions are filed, marked Exhibit "August No. 1."

5 Q. State whether or not the pamphlet filed by you with your answer to the last question was printed by authority of the City Council of the City of Richmond, as its ordinances passed within the period designated on the cover of this pamphlet?

Mr. TAGGART: Objected to, as asking for the opinion of the witness, and as incompetent, irrelevant and immaterial, and (291) calling for evidence which is not the best.

A. Yes.

6 Q. I now hand you, to be identified, a pamphlet marked "August No. 2," on the outside of which is printed the following: "Ordinances and Resolutions passed by the City Council of Richmond from the 1st of July, 1880, to the 1st of July, 1882, published by authority of the Council, and ask you to state whether that is a publication of the ordinances of the City of Richmond, printed by authority of the Council, containing the ordinances within the period specified?

Mr. TAGGART: Objected to as leading and as asking for the opinion of the witness, and as incompetent, irrelevant and immaterial, and also as encumbering the record with a large amount of immaterial and irrelevant matter.

A. Yes, sir.

7 Q. I now hand you a paper filed with the defendant's answer in this case to the original bill of complaint, marked exhibits Nos. 1, 2, 3 and 4, the last sheet of which appears to be certified by you as City Clerk as a copy of a resolution adopted by the Council of the City of Richmond. Please examine the same, and state whether or not that is a true copy, and whether that certification was made by you as City Clerk? A. (Examining) Yes, sir.

(292) 8 Q. Please state whether or not the resolutions at that time were published in the ordinances? A. No, not all resolutions; all ordinances are published in that form, but only certain resolutions, not all resolutions.

NOTE.—The further taking of the deposition of this witness is postponed until the next day.

(293) F. T. BATES, being recalled, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. Mr. Bates, please examine the endorsement made in pencil on Exhibit No. 2 referred to by you, and state if you know in whose handwriting is the pencil endorsement upon said paper? A. (Examining) That is Mr. S. B. Jacobs'.

2 Q. Who was Mr. S. B. Jacobs? A. He was formerly Clerk of the Committee on Streets.

3 Q. Are you acquainted with the handwriting of Mr. S. B. Jacobs so as to be able to identify it? A. Yes, sir.

CROSS EXAMINATION.

By Mr. TAGGART:

1 XQ. You have no knowledge of when that endorsement was made? A. No, sir.

2 XQ. Or under what circumstances? A. No, sir.

3 XQ. Only the handwriting is all you know? A. That is all, sir.

And further this deponent saith not.

Signature waived.

(294) The further taking of these depositions is adjourned until to-morrow, Wednesday, the 28th day of November, 1906. at 11 o'clock A. M., at the same place.

JOHN G. WINSTON,
Notary Public.

Office of the City Attorney,
City Hall, Richmond, Va.,

(295)

November 28th, 1906.

The further taking of these depositions is resumed this day at 11 o'clock A. M. pursuant to adjournment.

Present: H. R. Pollard, City Attorney, for City of Richmond:
Rush Taggart, A. L. Holladay, for Western Union Company:

C. V. MEREDITH, another witness introduced on behalf of the City of Richmond, having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. What is your name, age, residence and occupation?
A. C. V. Meredith, lawyer, age 56, residence Richmond, Va.

2 Q. Were you counsel for the Postal Telegraph Company in a suit lately pending in the Court of Appeals of Virginia,

against the City of Richmond? A. I was for a short time. After the case had been argued and submitted, a question of (296) settlement came up which I think prevented Judge Holladay from remaining as counsel, and I was asked to represent the Postal Telegraph Company in that matter, and advised as to a settlement of the case.

Mr. TAGGART: Mark an objection to that, as wholly irrelevant, incompetent, and immaterial to this case.

3 Q. Was there a settlement of that case? A. There was a compromise settlement of the case.

4 Q. Please examine the paper now handed you and state whether or not that was the agreement entered into for a settlement of that litigation; if so, please file it with the notary to be made a part of your deposition.

Mr. TAGGART: Same objection to question and answer and the introduction of the paper.

A. A paper was prepared and signed on behalf of the Postal Telegraph Company by my firm, and on behalf of the city of Richmond by Mr. Pollard. I cannot undertake to identify this paper as an exact copy without comparison with the original, which I believe is filed in the record in the Supreme Court of Appeals of Virginia. As far as I recall, it is the substance and I presume an exact copy, as I see it is attested by the clerk of the Supreme Court.

Said paper is here filed, marked Exhibit "Meredith #1."

Exhibit "Meredith #1."

With deposition of C. V. Meredith on behalf of City of Richmond.

JOHN G. WINSTON, N. P.

An agreement between the City of Richmond and the Postal Telegraph Cable Company as to settling the controversy involved in the litigation between said parties in the Supreme Court of Appeals of Virginia. The terms are as follows:

1st. That the proceedings are, upon the motion of the said City and with the consent of the said company, to be dismissed.

2nd. That no penalties or fines are to be claimed or enforced against the said company because of any acts of the company complained of in said proceedings, or for any similar acts done or omitted to be done since the said proceedings were instituted.

3rd. After said proceedings shall be dismissed as agreed, if the said City shall desire the said company to conform to the ordinance of the said city as amended since said proceedings were begun, due notice shall be given under said ordinance to file proper plans within two months after said notice, and to complete the work required within six months from such date.

4th. The order of dismissal shall allow to the said company all costs in the Court of Appeals, except for the taking before the Notaries of the evidence offered by the said company.

5th. A copy of this paper shall be filed with the Supreme Court as the basis of its decree or order.

CITY OF RICHMOND,

By H. R. POLLARD, City Attorney.

POSTAL TELEGRAPH-CABLE COMPANY,

By MEREDITH & COCKE.

A copy—Teste:

H. STEWART JONES, C. C.

Filed with depositions taken on behalf of the City of Richmond, Va., Jany. 10th, 1908.

JOSEPH P. BRADY, Clerk.

5 Q. State whether or not the litigation, in pursuance of that agreement, was dismissed in the Supreme Court of Appeals of Virginia.

(297) Mr. TAGGART: Same objection.

A. The litigation was dismissed in pursuance of the agreement that was entered into.

6 Q. Please examine the paper now handed you and state whether or not that is the order of the court entered in pursuance of the agreement.

Mr. TAGGART: Same objection.

A. After the suit was dismissed, I had a conference with the City Attorney in regard to what time would be required for the laying of underground wires by the Postal Telegraph Company. The time was fixed according to the ordinance, as I recall, and in obedience to the demand, I think from the City Engineer, the company filed its plans. What it did after that I cannot tell, as it did not come within my cognizance.

(298) No Cross-Examination.

And further this deponent saith not.

Signature waived.

(299) CARLTON MCCARTHY, another witness introduced on behalf of the city of Richmond, having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. Please give your name, age, occupation and residence? A. Carlton McCarthy, age 59, residence Richmond, Mayor of the city of Richmond.

2 Q. How long have you been Mayor of the City of Richmond? A. About two years.

3 Q. How long have you been connected in any other capacity, or have you been connected, with the city government in any other capacity; if so, in what capacity and how long were you so connected? A. I filled the position of Special Accountant of the City of Richmond for probably eight or nine years before I was elected to the Mayoralty. Previous to that time I had been in the city employment, with an interval of some years between the first and second employment.

4 Q. What was your first employment under the city government and how long did it last? A. I was first employed in making the special assessments for public improvements, for I do not remember exactly how many years, probably six or seven years.

(300) 5 Q. State whether or not in your capacity as Mayor of the City of Richmond, you have made yourself more or less familiar with the ordinances of the city, and especially with the ordinances regarding the placing of the wires in conduits, in the underground territory? A. Well, I have necessarily been obliged to familiarize myself with the city ordinances, and in addition to that fact, I happen to have prepared the code

which the city now uses before I was elected to the Mayorality. I compiled an index to the code which is now used and necessarily familiarized myself with all of the ordinances in force. I have been particularly interested in all ordinances that affect franchises of all sorts, and have given them special attention.

6 Q. As I understand you then you compiled the Richmond City Code of 1899 which contains the chapter 88 with reference to the maintenance of poles, wires and conduits in the City of Richmond, is that true? A. Yes, sir, I did, codified the ordinances.

7 Q. Have you given serious consideration to the question for the necessity of placing wires underground in the underground district in the City of Richmond?

Mr. TAGGART: We object to that as immaterial.

A. I have heard the matter discussed for years; I could not well do otherwise; and I have been interested in it and necessarily thought about it a great deal. I have had no immediate connection with that work; what I know about it and (301) what I have thought about it has resulted from the general supervision I have as Mayor over all the interests of the city.

8 Q. Are you charged, under the charter of the City of Richmond, with the duty to supervise the administration in general of the city's affairs, and particularly to see that the ordinances are complied with.

Mr. TAGGART: Objected to as asking the opinion of the witness, and not the best mode of proof.

A. Well, I am required by the Constitution of the State of Virginia to supervise all departments of the city government and that duty is made obligatory by the Constitution. That is what the office of Mayor seems to be for. The Constitution not only invests the Mayor with that power, but also imposes upon him the obligation to supervise every department of the city government, and, by conferring a special power, even extends the right of supervision to legislation—recognizes the right of review, at any rate—by conferring the right of veto and by requiring a largely increased vote to pass an ordinance over the veto, more than a mere majority.

9 Q. Will you state what you consider the grounds for your opinion that electrical wires should be placed underground in the underground territory?

Mr. TAGGART: We object to that as assuming a fact not proved, and wholly incompetent, irrelevant and immaterial.

(302) A. Well, the positive requirement of the ordinances of the city is the first ground for objection to overhead wiring; of course I have learned by reading and by observation and by the testimony of the ablest experts of the United States that **overhead wires** are both objectionable and dangerous. The practical objection is the fact that numerous wires, even though they are harmless with reference to any current they may carry, are a serious obstruction to the operation of the Fire Department; they obstruct the operation of the firemen in raising ladders and approaching fires on the fronts or sides or rears of buildings, and when they extend over the roofs of houses, they increase the hazard of the firemen who is attacking fires, they are apt to throw him and injure him in one way or another, even without the presence of a current. Where they carry a heavy current, as for electric lighting, and for railroad purposes, they are dangerous to life and property, because the current very readily follows the line of any harmless wire that happens to fall across the larger current wire, and the probabilities are that countless fires will originate from contact of otherwise harmless wires with those carrying heavy currents; so that the innocent wires, multiplied in number and in direction, are just as dangerous as live wires, because when they fall across the live wires they become just as destructive of life and property as the wire with the heavy current on it; and they are probably (303) more apt to create accident than the charged wire itself, because the people naturally avoid the dangerous wires, whereas they would not hesitate to seize one of them which they supposed to be innocent, but which may be really dangerous because of the contact with the charged wire. Another objection which is not so serious is that the large number of wires erected in recent days, necessitating a large number of poles, destroys the view along the street, obliterates practically the fronts of the houses. In some instances the poles are so numerous that they obstruct the use of the sidewalk by the people, and it would seem that they must be limited in number in some way or other; either the poles will have to be limited in number or the usefulness and beauty of the streets must be destroyed. They must disappear in the order of nature, it seems to me. I would like to add of course, that my ground for objection is the law; outside of that, my opinions about it amount to nothing. Officially I am obliged to recognize the requirements and the justness of the law, which requires their removal. I am sworn to enforce that law enacted by the City Council.

10 Q. Has the City of Richmond recently been sued in

one of the courts for damages growing out of the death of a fireman who received an electric shock from a wire of the Western Union Telegraph Company?

Mr. TAGGART: We object to that as wholly irrelevant, incompetent and immaterial.

A. I have received notice of a suit which mentions several parties to the suit. I was interested in it because the city of Richmond was one of the parties mentioned. I do not remember just who else was included in the notice.

11 Q. I now hand you a paper emanating from the Law and Equity Court of the City of Richmond and certified by its clerk as a true copy, summoning the City of Richmond to appear along with other defendants to answer the action of H. H. Wright, administrator of Eugene Wright, deceased. Is that the paper to which you referred; if so, please file it with your deposition as a part of it.

Mr. TAGGART: Objected to as wholly incompetent, irrelevant and immaterial.

A. You asked me about a wire; I do not remember that any wire was mentioned in connection with it. (Examines paper) Yes, sir, that is according to my recollection of the paper that was served on me.

Mr. TAGGART: Note the same objection to the paper.

Said paper is here filed marked, exhibit, "McCarthy #1."

Exhibit "McCarthy #1."

With deposition of C. McCarthy on behalf of City of Richmond.

JOHN G. WINSTON, N. P.

The Commonwealth of Virginia to the Sheriff of the City of Richmond—Greeting:

We command you to summon Western Union Telegraph Company, a corporation; Virginia Passenger & Power Company, a corporation; Richmond Passenger & Power Company, a corporation; Richmond Traction Company, a corporation; Virginia Electrical Railway and Development Company, a corporation; City of Richmond, a municipal corporation; and

William Northrop and Henry T. Wickham, Receivers of the Circuit Court of the United States for the Eastern District of Virginia, in the suit of Bowling Green Trust Company *vs.* Virginia Passenger & Power Company & als., to appear at the clerk's office of our Law and Equity Court of the City of Richmond, at the Courthouse of said City, at the Rules to be holden for said court on the first Monday in December, 1906, to answer the action of H. H. Wright, administrator of Eugene M. Wright, deceased.

Of a plea of trespass on the case.

Damages ten thousand dollars.

And have then there this writ.

Witness, P. P. Winston, Clerk of our said court, at Richmond, the 17th day of November, 1906, and in the 131st year of the Commonwealth.

P. P. WINSTON, Clerk.

A copy—Teste:

P. P. WINSTON, Clerk.

Filed with depositions taken on behalf of the City of Richmond, Va., Jany. 10th, 1908.

JOSEPH P. BRADY, Clerk.

A. (Continued) I have a great many notices served on me, and I do not make any record of them—probably I ought to.

12 Q. I now hand you, to be identified and filed as part of your deposition, what purports to be a copy of the declaration filed in the Law and Equity Court by H. H. Wright. (305) "H. H. Wright, administrator of Eugene M. Wright, deceased, plaintiff, against the Western Union Telegraph Company, a corporation, the Virginia Passenger & Power Company, a corporation, Richmond Passenger & Power Company, a corporation, the Richmond Traction Company, a corporation, Virginia Electrical Railway & Development Company, a corporation, City of Richmond, a municipal corporation, and William Northrop and Henry T. Wickham, Receivers, of the Circuit Court of the United States for the Eastern District of Virginia in the suit of Bowling Green Trust Company *vs.* Virginia Passenger & Power Company and als., defendants, of a plea of trespass on the case."

State whether or not that paper is what it purports to be, and as quoted.

Mr. TAGGART: Same objection to the question and to this paper.

A. (Examining) I should say so, sir.

Said paper is here filed as exhibit "McCarthy #2."

Exhibit "McCarthy #2."

With deposition of Carlton McCarthy on behalf of
City of Richmond.

JOHN G. WINSTON, N. P.

VIRGINIA:

In the Law & Equity Court of the City of Richmond.

H. H. Wright, administrator of Eugene M. Wright, deceased, plaintiff, complains of the Western Union Telegraph Company, a corporation; the Virginia Passenger & Power Company, a corporation; Richmond Passenger & Power Company, a corporation; the Richmond Traction Company, a corporation; Virginia Electrical Railway and Development Company, a corporation; City of Richmond, a municipal corporation; and William Northrop and Henry T. Wickham, Receivers of the Circuit Court of the United States for the Eastern District of Virginia in the suit of Bowling Green Trust Company vs. Virginia Passenger & Power Company and als., defendants, of a plea of trespass on the case, for this, to-wit, that heretofore, to-wit, on the 21st day of June, 1906, in the City of Richmond, the plaintiff's intestate was an employee in the Fire Department of the City of Richmond, whose duty it was to respond to fire alarms and to assist in extinguishing fires.

The defendant, the Western Union Telegraph Company, was a corporation engaged in sending and receiving messages and telegrams by wire, and for this purpose, on the day and year aforesaid, in the City of Richmond, it had erected and was then and there maintaining in the public streets of said city and particularly on, "Broad Street between the western side of Adams street and the Eastern side of Eleventh Street," a large number of telegraph poles, with cross-arms, the same being an overhead appliance, upon which in mid air, but directly over and along said Broad and other streets were stretched or hung a great number of telegraph wires for conveying said messages and telegrams.

The defendants, The Virginia Passenger & Power Company, Richmond Passenger & Power Company, Richmond Traction Company, Virginia Electrical Railway and Development Company, on the said 21st day of June, 1906, were corpora-

tions and controlled by the defendants William Northrop and Henry T. Wickham, Receivers of the Circuit Court of the United States for the Eastern District of Virginia in the suit of Bowling Green Trust Company *vs.* Virginia Passenger & Power Company and als., and each of said last named defendants were then and there engaged in the business of furnishing electric lights to the City of Richmond and its residents, and for this purpose, on the day and year aforesaid, said last named corporations and receivers had erected and were then and there maintaining in the public streets of said city and particularly on "Broad Street between the western side of Adams street and the eastern side of Eleventh street," a large number of electric poles with cross-arms, the same being overhead appliances, upon which in mid air, but directly over and along Broad and other streets, were stretched or hung electric wires conveying an electric current of high and dangerous voltage for creating arc and other lights in said city.

The defendant, the City of Richmond, was then and there a municipal corporation, created under the laws of the State of Virginia, which had the legal right, power and duty to keep its public streets open and free from obstructive and dangerous agencies and appliances, and the further legal right, power and duty to control and regulate telegraph and electric light companies operating and using its public streets.

In pursuance of its said legal right and power and duty, the said City of Richmond, on the 15 day of March, 1902, and on December 18, 1903, passed ordinances, being Chapter 88, of the City Code, 1899, as amended, entitled an ordinance "concerning wires, poles, conduits, etc., in, over and under the streets," all of which said ordinance consisting of thirty-three sections is here referred to, and specially pleaded as if here set out in full; and, also compiled copies are herewith filed, marked "Exhibit A," and asked to be read as a part of this declaration.

By the 27th section of said ordinance, it is provided that "The telegraph, telephone and electric light and power overhead wires and cables (other than trolley wires) and all other overhead appliances for conducting electricity, and the poles therefor heretofore and now being in any street, alley or public ground of the city, owned and maintained under any existing franchise, are hereby ordered to be removed from the following named streets, to-wit: On Broad street from the western side of Adams street to the east side of Eleventh street; on Bank street from the western side of Ninth street to the eastern side of Twelfth street; on Main and Cary streets from the western side of Seventh street to the eastern side of Fourteenth street; on Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth,

Thirteenth and Fourteenth streets from the northern side of Broad street to the southern side of Cary street, — months from the date of the approval of this ordinance, and any such wires hereafter installed under any existing franchise or under any franchise hereafter granted shall, within the limits of the above described district, unless otherwise provided by the City Council, be placed underground within twelve months from the date of permission granted by the City Council. Any company, corporation, partnership or individual, owning or controlling any such overhead wires, cables or appliances, or poles, that refuses, neglects or fails to remove them from overhead within the time as hereinbefore provided, or which fails to place said wires, hereafter installed in the said underground district, underground as hereinbefore provided, shall be liable to a fine of not less than \$100.00 nor more than \$500.00 for each pole so remaining, to be imposed by the Police Justice of the City of Richmond, and for every week of continued failure and neglect to so remove them after the imposition of the fine above mentioned, such company, corporation, partnership or individual shall be liable to a fine of not less than \$100 nor more than \$500, to be imposed as above stated. And any overhead wires hereafter installed subject to the provisions of this ordinance."

By the 28th section it is provided: "That all telegraph, telephone and electrical light and power wires and cables, including feed (but excluding trolley wires), and all other appliances for conducting electricity, shall be removed from the streets, alleys and public grounds of the City of Richmond within the territory mentioned in the foregoing section within six months after the passage of this ordinance, and every individual, partnership, corporation or company owning such wires within said territory shall, within two months after the passage of this ordinance, submit to the Committee on Streets and Shockoe Creek plans and details, showing the location, plan, size, construction and material of such conduits. Such plans may be altered or amended by said committee and when satisfactory to it shall be approved, and thereupon it shall become the duty of the owner of such wires to proceed with the construction of such conduits in accordance with the plans so approved, and in a manner satisfactory to the City Engineer. The pavement of the streets and alleys wherein such conduits are laid shall be properly replaced, and shall be kept in proper repair to the satisfaction of the City Engineer, and the City shall be saved harmless from any and all damages arising from laying such conduits. Such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys, and shall provide for an increase thereof to at least the extent

of 30%; such increase of space is not to be occupied by any such company, corporation, partnership or individual, directly or indirectly, without the consent of the Committee on Streets and Shockoe Creek, but the wires of the City shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires. After obtaining the consent of the Committee on Streets and Shockoe Creek, any other corporation or person now having wires in the streets, or hereafter desiring to run wires therein, may occupy necessary and proper portions of such conduits upon such terms as may be agreed upon with the petitioner; and in case of disagreement upon terms to be determined by arbitration as herewith provided, any such company, corporation, partnership or individual so placing its wires underground in any street, alley or public ground of said city shall upon notice from the City, or any of its departments, that a local improvement of gas, sewer or water main or branch thereof is to be constructed or repaired in such manner as will necessitate the moving or altering of its conduit or conduits or their appurtenances, of said individual, partnership or company or corporation, move or alter the same at its own expense so as to permit the construction of the improvement where ordered, and should any company, or corporation omit to comply with such notice, the conduit, or conduits, or their appurtenances, may be altered or moved by the city, and the costs and expenses thereof recovered from such individual, company or corporation. Manholes shall at all times conform to the grades of the streets. The location, size, shape and sub-division of such conduits and the materials of which they shall be made and the manner of construction shall be satisfactory to the City Engineer. The work of laying underground conduits, tubes, pipes, electrical conductors, cables and wires shall be under the direction and to the satisfaction of the superintendent of Fire Alarm and Police Telegraph, who shall at all times have free and unobstructed access to the conduit, tubes, pipes, electrical conductors or cables for the purpose of inspecting the same or making connection therewith for conduit wires or conductors in use or to be used by the City."

By reason of said ordinance it then and there became the duty and was the duty of said defendants, the Western Union Telegraph Company, the Virginia Passenger & Power Company, the Richmond Passenger & Power Company, the Richmond Traction Company, the Virginia Electrical Railway and Development Company, and William Northrop and Henry T. Wickham, Receivers, on or before the 18th day of June, 1904, to remove from Broad Street between Adams Street and Eleventh Street all "telegraph and electric wires and cable and all overhead appliances for conducting electricity, and

the poles therefor, belonging to their respective corporations."

And it then and there became and was the duty of said defendant, the City of Richmond, to enforce its said ordinance and to have said wires, overhead appliances and poles removed from Broad Street, within the limits heretofore designated. Yet the said defendants, the Western Union Telegraph Company, the Virginia Passenger & Power Company, the Richmond Passenger & Power Company, the Richmond Traction Company, the Virginia Electrical Railway & Development Company and William Northrop and Henry T. Wickham, Receivers, in violation of their said duty and in disregard and defiance of said ordinance of the City of Richmond, wilfully, carelessly and negligently failed, neglected and refused to move their respective wires, overhead appliances and poles from Broad Street between Adams and Eleventh Street, on the said 18th day of June, 1904, or at any time thereafter, and on the day first written, to-wit, the 21st day of June, 1906, said defendants still wilfully, carelessly and negligently failed and refused to move their said respective wires, overhead appliances and poles from said street in the city of Richmond, and permitted the same to be and to remain in said street from June, 1904, to the 21st day of June, 1906, and to the present time in violation and defiance of said valid ordinance.

And the said defendant, the said City of Richmond, carelessly and negligently failed to perform its duty in the premises in enforcing said ordinance, and in removing said wires, overhead appliances and poles from Broad street between Adams street and Eleventh street, but carelessly and negligently permitted the same to be and remain on said Broad street from June 18th, 1904, to the 21st day of June, 1906, and to the present time.

On the day last named and before and after that date, the telegraph wires of the said defendant, the Western Union Telegraph Company on Broad street were on taller poles and overhead appliances and stretched or hung higher than the electric lighting wires on the same street of said defendants heretofore named as engaged in that business, whose high current and dangerous electric lighting wires hung immediately under and in close proximity to the wires of said Western Union Telegraph Company, which latter were in themselves harmless, and on the last aforesaid, before and after one of the said telegraph wires of the said defendant, the Western Union Telegraph Company, by and through the carelessness, negligence and wilful disobedience of said company in its failure and refusal to obey and carry out the said city ordinance and to remove its wires, overhead appliances and poles, had sagged and dropped, to-wit, near Eighth and Broad streets so far down from

its proper place and level that it came in contact with and crossed the electric lighting wire of high alternating current and dangerous voltage of the defendants, the Virginia Passenger & Power Company, the Richmond Passenger & Power Company, the Richmond Traction Company, the Virginia Electrical Railway and Development Company, and of William Northrop and Henry T. Wickham, Receivers, whereby, and also by reason of the carelessness, negligence and wilful disobedience of said last named defendants in their failure and refusal to obey and carry out said city ordinance and to remove its wires, overhead appliances and poles from Broad street between Adams and Eleventh streets as aforesaid, the said telegraph wire of the said defendant, the Western Union Telegraph Company which led or went to the top or roof of the building No. 610 East Broad street occupied by the Evening Journal, a newspaper, and furnished their telegraph service, became charged with the same high alternating current of dangerous voltage as characterized the electric light wire with which it came into contact at, to-wit, near Eighth and Broad streets in front of Murphy's Annex.

And the said plaintiff avers that on the night of June 21st, 1906, his intestate in response to an alarm of fire, as was his duty as an employee of the Fire Department of the City of Richmond, as aforesaid, went to the building No. 610 East Broad street in said city, and occupied by a newspaper company, known as the Evening Journal, and which said building was, or was supposed to be on fire, and the said plaintiff's intestate in the due and proper performance and discharge of his duty, mounted to the roof of said building, and while on said roof, parapet or cornice of said building, in the discharge of his duty, the said plaintiff's intestate, without any fault or carelessness on his part, came in contact with said telegraph wire of said Western Union Telegraph Company, so charged as aforesaid with a high alternating current of dangerous voltage from the electric lighting wires of the said defendants, the Virginia Passenger & Power Company, the Richmond Passenger & Power Company, the Richmond Traction Company, the Virginia Electrical Railway & Development Company, William Northrop and Henry T. Wickham, Receivers, and received the shock and current of said wire through his body and was then and there instantly killed thereby. To the damage of the said plaintiff, \$10,000. And therefore he brings his suit.

SMITH, MONCURE & GORDON, p. q.

A copy—Teste:

P. P. WINSTON, Clerk.

Filed with depositions taken on behalf of the City of Richmond, Va., Jany. 10th, 1908.

JOSEPH P. BRADY, Clerk.

Mr. TAGGART: Note the the same objection to the paper.

13 Q. In the deposition of James Merrihew, a witness examined on behalf of the Western Union Telegraph Company, in this case, I find that the witness, by question 31, had this inquiry propounded to him:

"I call your attention to section 1 of an ordinance Exhibit #1 with complainant's bill in this case.

The provision of that section is—

(306) 'Hereafter no pole shall be erected, nor any wire or other apparatus, used in connection with the transmission of electricity, be placed in position, in any street or alley of this city, until the City Engineer shall have first determined upon the size, quality, character, number, location, condition, appearance, and manner of erection, of such poles, wires or other apparatus.

Whenever at any time the said poles, wires, or other apparatus, shall, in the opinion of the City Engineer, need changing in size or location, replacing, repairing, being made safe and secure, or being put in proper and suitable condition and appearance, such one of the persons, so using the same (if there be more than one, as shall be selected by the City Engineer) shall immediately proceed to do such changing as to size and location, replacing, repairing, making safe and secure, or putting in proper and suitable condition and appearance, as the said engineer shall designate in writing, and all damage done to any street, by the erection of any pole, shall, from time to time, be rectified and repaired, as required by the City Engineer.'

I will ask you whether, in your experience and your judgment, the requirement of that section would be reasonable or unreasonable, taking into account the requirements of telegraphic operation and maintenance."

(307) To which question the witness answered:

"I think that would be entirely unreasonable."

I want to know from you whether or not you consider the requirement of that section, embodied in the question above addressed to Mr. Merrihew, as wholly unreasonable, as he says.

Mr. TAGGART: Objected to as wholly irrelevant, incompetent, and immaterial.

A. I should say that those recommendations are absolutely essential as safeguarding the lives of the people in the first place, and in the next place as preserving the rights of the people to the streets. It would be absurd to suppose that any corporation ought to be allowed to invade the streets of a city, and erect poles of any size, of any length, and in any number, at any place they chose to select. It would mean that the highways of the city, intended for the use of the people, had been surrendered to the control and use of the corporation using them under such circumstances and practically to the exclusion of the people. I do not see why any sane man should doubt both the wisdom and necessity, for regulating through the proper officers of the city the number, the size, the location and the material entering into the poles. But for that regulation we would have surrendered to the telegraph companies and other corporations the inherent and inalienable rights of the people to (308) the streets. The truth is that the street is the most sacred and inviolate property that the public has, and that they cannot be invaded by any power short of the Legislature, and I think it is exceedingly doubtful whether there is any power in the City Council to divert to the use of the corporation any more space than is absolutely necessary for the accommodation of its public utilities; and with my understanding of the rights of the people in the streets, and with my full appreciation of the fact that the streets are the most vital asset that the city owns, I believe that these regulations are absolutely essential, and that it would indicate gross negligence and indifference on the part of the council if they did not make those regulations and enforce them.

14 Q. Further on the same witness says, "I take it that the managers of the Telegraph Companies, having had years of experience in construction, would be better qualified to determine as to the quality of poles, wires, and other apparatus, than would the City Engineer. The Telegraph Companies know better than would the City Engineers."

Therefore he concludes that this regulation is unreasonable. Do you concur to that?

Mr. TAGGART: Same objection to that.

A. Not at all. On the other hand, I differ absolutely with the opinion expressed there, because practically the work of construction is intrusted by the telegraph companies to people who are far from being as capable of exercising good judgment as such an officer as the Engineer of the City of Richmond. I should say he was equal in ability to determine questions of that sort with any officer of the Western Union Telegraph Company, and infinitely better qualified to decide them than the employees they generally use in constructing lines of telegraph, and unquestionably the best judge of the question of the best location of the poles regarding the interests of the city.

15 Q. This same witness, in question 35, is asked in regard to the reasonableness of section 4 of chapter 88, which authorizes the Committee on Streets to require any person or company owning any pole used for telegraph or telephone purposes, to allow other persons to use the same pole; the evident object of which is to prevent the multiplication of poles on the streets; and further providing that in case an agreement cannot be reached, the matter should be submitted to arbitration. In regard to which requirement this witness says:

"It is objectionable to a responsible telegraph company to have the wires of other persons or corporations, perhaps irresponsible, thrust upon them; they would be liable to interruption of circuit," etc.; and other objections are given, which he claims affect in some degree the successful operation of the telegraph company's business. State whether or not you consider the requirement as to the joint use of poles reasonable and just?

Mr. TAGGART: Same objection.

A. I should say that without some such requirement, all (310) of these corporations using poles would have to abandon the routes through the city. If every company using electric wires is entitled to have separate and independent poles of its own, we would have two different street car companies with separate and distinct poles, we would have two separate and distinct telegraph companies, each one with a line of poles; we would have the Bell Telephone Company with its line of poles; we would have the Virginia Electrical and Railway Company with its line of poles; and we have had applications for franchises from several electrical operating companies who would have been obliged to have poles. We would have separate and distinct lines of poles for the police patrol boxes, and we would have another distinct set of poles for the fire alarm telegraph;

and as the use of electricity advanced, we would have burglar alarms and we would have private calls, each separate corporation requiring a separate set of poles. We would soon have a pine forest of poles here in town, there would not be space for vehicles to pass through the streets, through the poles; and it is perfectly absurd to me to hear anybody object to an ordinance which gives the use of poles mutually to corporations. The city government has imposed that regulation for itself and has stated the location of its wires, only specifying the position of the wires on the pole for convenience. The argument of the necessity for the use of separate poles is only another argument for the justness of the demand that they should all go underground. If it is unjust to require the joint use of poles, the multiplicity of poles for independent lines would be so great that they would obstruct the streets, and the only cure for it is for the wires to go underground.

16 Q. In question 41 addressed to the same witness, he was asked if it would make any difference in the management of telegraph lines if a city official had the power to determine whereabouts on the poles the city wires should be placed as provided in the section, instead of being placed in such a position on the poles as seemed proper to the superintendent, (I presume the superintendent of the company); to which the witness said "It would, decidedly."

State whether or not it would be reasonable and just for the public service corporation to determine where the wires of the city should be located on the poles?

Mr. TAGGART: Same objection.

A. That objection is utterly unreasonable, because of the fact that the telegraph companies themselves use any number of wires on the same pole, all of which are telegraph wires, and the city of Richmond does not own any other kind of wires. Every wire which the city owns to-day is a telegraph wire; it is either for telegraphing police intelligence, or telegraphing fire alarms, and there cannot be any possible objection to the placing of the city wires on the poles above their wires, or on either side of them. They might as well complain of their own (312) wires being there. There is no difference in the world in the wires, or the current they bear. The presumption there is that the city is going to put up electric light wires, carrying enormous currents, or power wires carrying enormous currents. But the truth is that the city does not own any such wires, does not use them, and, in that case, if the city's wires were objectionable to them, their own wires would be objec-

tionable to each other, and they ought not to have but one wire on each pole.

17 Q. The same witness is interrogated in regard to section 8 of the ordinance, which provides that the city reserves the right to put on, at any time, other restrictions and regulations as to the use of wires, poles and other apparatus for the transmission of electricity, and, from time to time, to provide that the wires be removed from poles and be put in conduits. The witness is asked whether or not he considers this reasonable, and he answers in effect that he considers it very unreasonable. Will you state your views in regard to that matter?

A. Well, the city must reserve the right to control unseen powers; it must reserve the right to control and direct the use of an agent which is now in its first development; and the necessity for that reserved right of control, it seems to me, is made apparent the moment you consider the reverse position if the city opened its doors to anybody to use electricity in any shape or form they chose. The agent is too dangerous, and the possibilities (313) of its use are so mysterious and unknown that it would be criminal in the Council to do otherwise than to reserve the absolute and unqualified right to control its use in the streets. I believe that a member of the Council who failed to do his duty in restricting the use of electric wires in this city would be criminally responsible. He is sworn to protect the lives of the people, and these trolley wires, dangerous as they seem to be, or heavy current electric light wires, are not more dangerous than the telegraph wires, because all it has to do is to touch the other and if a person touches the telegraph wire when it is crossed with a trolley wire or heavy electric light wire, death ensues. The truth is, that there is no excuse, with the knowledge we have, for a Legislative body that does not in the most unequivocal manner in granting franchises reserve the absolute power of control and direction, and in official capacity I demand now that the Council always reserve an absolute right of revocation. I will not sign another franchise involving the use of the streets, and the use of the mysterious agents that are now being introduced, unless it involves the absolute right of revocation at the pleasure of the Council. The trouble in this case is that the franchise exists, and, as I understand, the effort is now for the people to protect themselves. The people have been put on the defensive by this corporation. It is a reversal of the natural attitude. The city ought to be (314) always dominant, and the corporations subservient, but by their skill and ingenuity they have put themselves on a level with the people in adjudication. There is where the Council surrenders its position and puts itself on equality with one of its servants, one of its creatures, and they ought never,

under any circumstances, to abandon the right of absolute revocation; certainly they ought never to surrender the right of absolute control and direction. They have no right to do it. They are traitors to the trust the people have imposed on them if they do not reserve that right.

18 Q. In regard to necessity for inspection of the wires of electric companies by the city, the same witness states that in his opinion one man might easily inspect all the wires of the Western Union Telegraph Company, within the city of Richmond, in order to ascertain that they are being kept in a physical condition to be reasonably safe, within a single day. What do you think about that?

Mr. TAGGART: Same objection.

A. Well, I answer that by saying that there was a time when, because of my attention to other public duties, I saw the condition of wires in the streets of Richmond at midnight, and it was necessary at that time to take the entire fire department of the city of Richmond, every man connected with it, and put him on the streets, and keep him on the streets, in active motion, to keep the people from being killed by the usually harmless wires that are stretched in the streets. There are no 50 men (315) in Richmond who could have testified to the safety of the physical condition of the wires then; and there are no dozen who, for a week afterwards, could have testified to the condition of the wires of the Western Union Telegraph Company, or any other telegraph company, or any railroad company, or any telephone company, in the city of Richmond. And moreover, I would say that on two occasions there were solemn conferences held in the Mayor's office between the Mayor of the city, the superintendent of the city electrical wires, and the authorities of the telegraph, telephone and railroad companies, in which efforts were made to determine whether the currents could be then used in this city without great destruction of life and property; and the question was never satisfactorily answered. When the Mayor was asked to assume the responsibility, he refused to do it. When the parties handling the current were asked if they were willing to put on the current and take the responsibility, they replied that they were not. And finally, as a solution of the question, there was an arrangement made of signals, danger signals, etc.; and it was agreed that small currents, harmless comparatively, should be first put on the wires and the result noticed. If no harm came, other currents were to be added, increased power, and increased distance and over different circuits, and it was a fact that it was necessary for the city authorities to proceed in that way, to try

first one circuit and then another, with modified and increased currents, to determine whether they could use the currents (316) without the destruction of both life and property. During that period of time, the whole fire department of the city of Richmond, usually confined to the station houses, was in the streets, warning people away from the wires, and replacing dangerous wires. And not only that, but special orders were issued to the police department of the city, comprising a hundred men, to devote their attention principally to the protection of life. So that the assertion that one man can determine the physical condition of said wires in this city is untrue. The truth is that the city of Richmond employs one very competent man as superintendent, with several assistants under him, who devote their whole time, at considerable cost to the city to the police and fire alarm system, and they constantly report that there is hardly a day in the week when those systems are in perfect condition. They require constant and unremitting care to keep them in condition. Of course the wires of any one telegraph company are, by comparison, rather simple; but they are important because it is only necessary to cross their wires with some other wire, or cause their wire to cross some other heavy current, to make the whole system their own, as dangerous as a trolley wire on Broad Street.

19 Q. What was the occasion to which you referred in which the whole fire department was called into requisition?

A. We had just had a sleet storm, it was a natural cause.

(317) 20 Q. About what date? A. What was the winter? I don't remember; it was the same year when Burton was arrested, during that time.

21 Q. It was in the winter of 1905-06? A. Yes. That was an unprecedented condition, nothing like it had occurred in the history of the city; nobody anticipated, nobody could control it. There was no cure for it, but care and vigilance.

22 Q. You have spoken of the whole fire department being employed in looking after the wires at that time; how many men were in the employ of the fire department of the city of Richmond that were engaged in this duty for several days? A. I don't know the exact number, but I suppose at least fifty station men, besides the runners who were called into service.

23 Q. This same witness is asked by Question 51, in respect to the provision:

"That all telegraph, telephone and electric light and power wires and cables, including feed (but excluding trolley wires) and all other appliances for conducting electricity, shall be removed from the streets, alleys and public grounds of the city

of Richmond within the territory mentioned in the foregoing section."

(318) and he was asked whether, in his opinion and experience, that section would act upon the telegraph companies, reasonably or unreasonably—in the management of the telegraph companies; to which question he replies that in his opinion it would be objectionable to a responsible telegraph company to have the wires of other persons or corporations thrust upon them, that there would be a liability of interruption of the circuits. It is in fact, the same objection that he makes to the joint use of conduits as he made to joint use of poles.

Mr. TAGGART: The same objection, and as assuming facts not proven, incompetent, irrelevant and immaterial.

A. Well, the same objections cannot possibly apply, because in the use of poles there is danger of contact of the wires under some circumstances, and there may be some electrical interference in cases where wires carrying a heavy current were put near the ordinary telegraph wires. But in the conduits, nobody has ever complained of the interference of wires with each other when they were in separate conduits, because in the conduit system, the wires in each cable are insulated one from another, one cable carrying from 200 to 300 wires, communicating with as many different telephones for instance as they have wires there. But after those wires are insulated one from the other, they are closed in a water tight and air tight pipe and that lead pipe is drawn through one duct of terra cotta conduit, and it is impossible that the same objection should hold good in both cases; because the objection in one case must be the danger of interference by induction, or actual contact of the wires, and in the other case those two things are impossible. In proof of that position, and as showing the practicability of the same interests using the same conduits, the City of Richmond, in granting franchises for conduits, has always reserved the special privilege of putting its own wires in the conduits of other people, regarding it as a very valuable reservation. All legislation with which I am acquainted providing for the use of conduits for electrical wires, also provides that the conduits shall be open to the use of other parties than those who own the franchise, upon certain terms and conditions, usually that the price shall be agreed upon between the parties, and, if there is objection, that the price shall be settled by arbitration. The principle of the mutual use of conduits by different interest is recognized everywhere, and provided for; and I have publicly asserted that the city ought not ever to grant any fran-

chise for conduits which did not include a provision that they could be used by anybody and everybody who had use for conduits; because we cannot afford to have a multiplication of conduits systems in the city. It is a rather startling thing to say here in this community, but it is nevertheless a fact, that in this quiet city we are rapidly reaching the conditions that (320) exist in New York, that is to say, that the conduits, sewer and gas pipes, water pipes, electric light tubes, and the cables laid in the streets for the return of the railroad current—the whole area of the street is used, and there is a question now at some points whether there is room for another facility underground without digging a subway underneath the present sewers, etc. So whether it is pleasant, agreeable and satisfactory, or not, it is an absolute necessity that the use of the space underneath the street by different corporations and interests must be consolidated and reduced to the smallest possible space. And instead of that being an unreasonable requirement, it is a necessary requirement and one that the city ought not to abandon under any circumstances.

24 Q. Would not the multiplication of conduits in the streets greatly increase the frequency with which the streets would have to be dug up?

Mr. TAGGART: Same objection.

A. That is unquestionably true. And yesterday, standing on Main street, without moving out of my tracks, I pointed out to a member of the Council, not less than six concave depressions in Main street, all of them caused by the last trench dug to put in a conduit for the Electrical Development Company. The whole pavement for a block was ruined.

That is in the last twenty-four hours. The opening of the street once seems to destroy the possibility of ever having (321) a uniform pavement where it has been ripped up, it becomes an almost hopeless job to keep the streets in order. In Richmond to-day the best pavements we have are pitted and uneven, longitudinally and horizontally, showing the effect of trenches dug along underneath the street to lay these cables and conduits, and across the street to make the necessary connections? And I do not believe that any man in this community has ever begun to conceive of the additional cost to the city of keeping the streets in condition as the result of increase in substructures. The number of them nobody can estimate, or the damage that has already been done, or what it would cost to repair it.

25 Q. The attention of the same witness, in question 59, is called to the following provision of section 28:

"The pavement of the streets and alleys wherein such conduits are laid shall be properly replaced, and shall be kept in proper repair, to the satisfaction of the City Engineer; and the city shall be saved harmless from any and all damages arising from the laying of such conduits."

The witness is asked whether or not that requirement will bear reasonably or unreasonably on the Telegraph Companies, and the witness says that he considers it manifestly unreasonable. What do you think about that?

Mr. TAGGART: Same objection.

A. It seems to me to be the only reasonable provision that can be made. I cannot imagine any condition or any circumstance (322) stances under which it would be just to require the city of Richmond to go and correct all damage perpetrated by the companies using the highways. To give them the use of the street, and then undertakes to keep it in order for them, it seems to me would be utterly unreasonable. I cannot conceive of any other reasonable arrangement, but that they should be required and compelled to keep the street in order after they use it; for the very reason, if for no other, that when the conditions under the street have once been disturbed, experience demonstrates that it may require attention for 25 years to make it as good a street as it was before.

26 Q. This witness says, in one answer bearing upon this point, that the injury to the street would appear within one year at least, and therefore, to put an unlimited requirement into the ordinance, like the one referred to, would be unreasonable. What have you to say about that?

Mr. TAGGART: Same objection.

A. Well, I have practically answered that question in what I have just said, that no matter what that gentleman states, I know that the condition will not only appear within twelve months, but will continue to appear; and my observation and experience have taught me—an observation extending over 25 or 30 years—that there is only one thing that will cure the damage done by the digging of a trench, and that is to secure it by concrete. If it was filled with concrete, or a ridge of concrete of sufficient strength is put over it, the effects of the trench might disappear permanently. But unless that is done, (323) it will appear and re-appear; and so far as I know there is no remedy for the disturbed condition; I have never heard of it anywhere or heard of engineers saying there was any cure

for the conditions which result from disturbing the original conditions of the soil.

27 Q. How long have you been residing in Richmond?
A. About 59 years.

28 Q. In speaking of the length of time in which the injury to the street may be observed from digging a trench in it, is that statement made on your personal observation in regard to such matters in our city? A. Yes, sir, in this city.

29 Q. The same witness is asked further in regard to section 28, in reference to the requirements that at least one duct in the conduits shall be reserved for the city's wires. Do you consider this requirement reasonable or unreasonable?

Mr. TAGGART: Same objection.

A. I think that I have really answered that question in what I have already said. The purpose of the city in making that requirement is to prevent the multiplication of conduit systems. The city being supreme in a sense in its own street can conduct the conduit system wherever it chooses to do it; but they prefer by this simple recommendation to use systems which they allow to be constructed in order to prevent the multiplication of conduit systems. And but for a misconception of the effect of the ordinance passed by the Council of the City of (324) Richmond, there would have been only one system of conduits in Richmond and that would have been absolutely under the control of the city government. That was the purpose of the city, not only to confine the conduit systems to one, but to own it and occupy it first and let others come in under conditions. But it so happened that somebody was wise enough to write a little harmless looking ordinance and get it passed, which, to the consternation of some of the city officials, developed into the Electrical Railway Development Company scheme. When they came up here and applied to the City Engineer for the permit for the digging, he was very much surprised to find that they had the right.

I mentioned that to show that it was the purpose of the city to limit conduits to one system and compel everybody, including themselves, to use one system; and it is for that reason that whenever they grant a permit for a conduit, they reserve the right for themselves to go into it, and in the general ordinance they reserve the right for everybody to go in as soon as the terms can be arranged.

30 Q. In question 75 the same witness is asked in regard to this provision of the ordinance contained in section 31:

"No privilege as to the building and owning of said conduits shall last longer than fifteen years, at the expiration of

which time the city may put such other restrictions, conditions (325) and charges as it may see fit and shall be lawful, or may order its removal at the expense of the owner."

In regard to which this witness says that he considers that provision entirely unreasonable and unjust. Do you concur with him in that? A. Well, I have indirectly answered that question before. I am of opinion, officially, basing my opinion on experience and observation, that no privilege of this character ought to be granted which is not revocable. In the past, franchises have been granted for 30 to 35 years, but recently all city governments everywhere have been shortening the periods and reducing it to 30, 25, 20 or 15 year periods. That is a short period as compared with the practice in the past, but the disposition is to shorten the life of franchises which involve the use of power of any kind, systems of electricity, etc., and especially with reference to franchises which involve the use of undeveloped and mysterious agents. There is a good reason for limiting the right to construct conduits for the use of electric wires to a short period, because no man, no human being living to-day can estimate the possible dangers that will result from the use of electric currents. The electricians themselves know certain facts about electricity, but they do not understand it to-day any better than they did twenty years ago. They do not know what it is; nor what it is capable of doing.

By way of illustration, the President of the United States (326) visited this city, and rode up Main street in safety and went home. Within a few days after he rode up Main street an explosion occurred which threw heavy iron caps, nearly three feet in diameter, in the air to the tops of houses, accompanied by the usual noise. That was an explosion in one of the conduits under the street caused by an accumulation of gas, probably fired by an electric spark in an imperfect insulation of a wire. If that thing had occurred on the day that the President visited here, it would have damned this part of the country, in some parts of the country, for the next fifty years; they would have sworn we tried to murder him by an explosion. I just mention that as an illustration of the necessity of proceeding slowly in the matter of electrical current.

We learn new things every day about electricity, and the legislator is stupid and irresponsible, who does not take every necessary precaution, and wait. It has been recently said that electrical currents partake of the nature of X-Rays. Some scientists are claiming already that it is going to make us blind people, that electric lights are having a very serious effect on the optic nerve, and through that sensitiveness are affecting the intellectual condition of the people, and I believe it.

It may be necessary within a few years to forbid the use of electric lights altogether. And it is an unquestionable fact that the presence of electric currents affects the health of the (326) people. The best experts of the United States who can be employed by the railway companies have testified in this building in the last few days that it is practically impossible to prevent the escape of electric current when once created. And they are destructive; they not only create fires, but they disintegrate and destroy certain things; and they say that such a thing as perfect insulation is impossible. So, speaking with reference to the element of the time for which these rights should be granted, I do not hesitate to say that it is the part of wisdom to make the franchise of short life, in order that the Council may control new conditions as they develop. We cannot tell to-day about it; some man may be working now on some electrical idea that will revolutionize the whole system; and it is criminal conduct on the part of the City Council to grant interminable franchises, or franchises for a great length of time, that involve the use of electricity. They ought to reserve the right of control as to the length of time and as to the method of conduct of these things. And I repeat what I said before, that they are not only justified in limiting the life of the grants, but it is their duty to themselves and their constituents to reserve the right to revoke these privileges. They ought to be all revocable at the will of the Council.

31 Q. Is or not what you have just stated greatly strengthened when you consider the recent discoveries in connection with the transmission of messages by wireless telegraphy?

(328) Mr. TAGGART: Objected to as leading, and also as incompetent, irrelevant and immaterial to this proceeding.

A. The discovery of Wireless Telegraphy is leading rapidly to the introduction of wireless telephones; and those two things demonstrate that up to the time when those two possibilities dawned on the minds of the scientists, there were powers and possibilities in the electric current that no human mind ever conceived to exist. We cannot tell to-day what changes are taking place in the physical world as a result of the increased use of electricity. For instance, nobody makes electricity, it is simply gathered, and it has yet to be determined what will be the result of the unnatural diversion of the natural flow of currents of electricity. There is not any doubt about it whatever that the physical, especially the nervous, condition of the people of this country is being affected by it. Those things are unimportant in this case, except as demonstrating the reasonableness of strict limitations in the granting of franchises,

both as to the time and the terms and conditions. And my experience teaches me that it is just as necessary to restrain and control and direct all of the corporations using electricity as it is to restrain and control the liquor traffic or the sale and storage of dangerous fluids and compounds like gunpowder and gasoline and things of that sort, the truth being that we know more about gunpowder and gasoline and nitroglycerine than we (329) do about electricity.

Note, the cross examination of this witness is postponed to a later day.

Office of the City Attorney,

Richmond, Va., December 30th, 1907.

Counsel for Western Union Telegraph Company having this day stated that they did not desire to cross examine the witness Carlton McCarthy, his testimony is this day closed.

And further this deponent saith not.

CARLTON McCARTHY.

(330) ROBERT LECKY, JR., another witness introduced on behalf of the city of Richmond, having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. Will you please state your name, age, residence and occupation? A. Robert Lecky, Jr., 36 years of age, residence 2600 Grove Avenue, Richmond, Vice-President, Secretary and Treasurer of the Virginia State Insurance Company, and Manager of the Milwaukee Mechanics Insurance Company.

2 Q. What connection have you, if any, with the city government? A. I am the Clay Ward representative on the Board of Fire Commissioners.

3 Q. How long have you been on the Board of Fire Commissioners? A. Four years.

4 Q. State whether or not your position as an insurance man has attracted you to investigation and study in regard to fire risks in connection with electrical wires? A. It has, sir.

5 Q. What opportunities have you had for investigation (331) along those lines? A. In the city of Richmond, for

twenty odd years, I have attended every fire that has occurred when I have been in the city, and I have attended fires in other cities, and have taken great pains to notice the electrical conditions, along with the water conditions and defects in the construction of buildings.

6 Q. State whether or not in your opinion, based upon your investigation and observation, you think it important that all electrical wires, other than trolley wires, should be placed underground within the underground territory of the city of Richmond?

Mr. TAGGART: We object to that as incompetent, immaterial and irrelevant.

I deem it a public necessity, accentuated by the accidents that have occurred within the last few months.

7 Q. Tell those circumstances? A. On June 21st, 1906, about midnight, an alarm of fire was sent in and was responded to by the companies covering what we know as the retail dry-goods district, and the office of the Richmond Journal Newspaper was found to be on fire; and during the fighting of the fire, which was on the roof, one of the members of the Richmond Fire Department, Mr. E. M. Wright, lost his life.

8 Q. Are there other accidents that have come under your observation? A. Several years ago, at a fire in the Leftwich (332) picture store, on the north side of Main street between Ninth and Tenth, a falling wire caused the death of a dog and the stunning of a citizen. Both of those accidents were during the fighting of fires and were caused by the falling of low current wires over high current wires.

9 Q. State whether or not that is liable to occur as long as the wires remain overhead?

Mr. TAGGART: Same exception.

A. Yes, sir, and it is so regarded in the Fire Insurance business in the classification of towns.

Mr. TAGGART: We object to the answer as not responsive, and as hearsay.

10 Q. Classification made by whom, and under what circumstances?

Mr. TAGGART: Same objection.

A. The classification made by the National Board of Fire Underwriters, of which organization I am a member; the actual

work is carried out by a board of electrical, hydraulic, and other engineers, who are employed for the purpose of applying their practical knowledge to the various cities of the United States.

11 Q. Do you intend to be understood as saying that in densely populated cities, where wires are overhead, the insurance rates are greater than in cities of a similar density of population with the wires underground?

Mr. TAGGART: Same objection and question objected to (333) also as leading.

A. I do, sir.

12 Q. What is the difference in the rates, would you say?

Mr. TAGGART: Same objection.

A. The difference in the rates between a city properly safeguarded against the electrical wires in the streets, and one that has gone to the expense of placing them underground with the same fire protection, is generally about ten cents on each one hundred dollars of insurance.

13 Q. Are you acquainted with the limits of what is known as the underground territory within the city of Richmond? A. I am, sir.

14 Q. State whether or not in your opinion, gathered from observation and experience and study, the territory thus prescribed by the city is reasonable as to size? A. Owing to the increase in the business district of the city since the adoption of the ordinance, the limits are much less than they should be for the safety of the lives and property of the people.

15 Q. In other words, you think that the present territory is not only not unreasonably large, but should be enlarged?

Mr. TAGGART: Same objection, and also as leading.

A. The territory should be extended several blocks towards the westward, owing to the erection of high buildings, filled with people, in that territory within the last three years.

(334) 16 Q. You testified in the case of the city of Richmond against the Postal Telegraph Cable Company, lately pending in the Supreme Court of Appeals of Virginia, and it is proposed that the evidence in that case shall be copied into this and considered as given originally in this case. Please state now whether you remember, in a general way, your statements there made, and if you wish to correct or modify any statement made in that evidence? A. I remember the evidence

and believe that it presents the conditions to-day as it did at that time, with the exception that two statements made in that case have been verified by actual happenings since I gave that testimony. One has been referred to in the death of this man Wright, and the demoralization consequent from the death of that man, of the entire membership of the Fire Department; and the second is the experience of the city and its people resulting from the sleet storm of December 15th, when for many days a large portion of the city was subject to fire without our being able to use the city apparatus for the reporting of fires. Long lengths of wires were thrown in the streets, and nearly all of the members of the Richmond Fire Department were forced to patrol the streets day and night for forty-eight hours to prevent pedestrians and vehicles from coming in contact with those wires; and also, in the event of an alarm of fire, to prevent the Department apparatus from being delayed, or the members hurt or killed, by coming in contact with those obstructions.

(335) Those wires hung in all parts of the city, except on Main and Cary streets, from first to 20th. As an evidence of the condition, I would like to file this photograph, showing the condition at the corner of 35th and Franklin streets. This condition was duplicated in what is known as Lee District.

Said photograph is here filed as Exhibit Lecky #1.

A. (Continued) In the arcing of the wire that caused the fire at the Journal office, we found that the current was put onto the lower tension wire immediately in front of the largest hotel in the city. Had the fire not been discovered in the Journal office, and an alarm had come from Murphy's Hotel, the firemen who were engaged in fighting the fire, raising the ladders, and throwing streams would have got the charge that passed through the body of this man Wright on the roof of the Journal office.

Mr. TAGGART: We object to the answer as hearsay, and as irrelevant, immaterial and incompetent, and also object to the photograph on the same ground.

17 Q. Please make any other statement you wish in regard to this matter? A. I would like to emphasize the heavy demoralization of the members of the Richmond Fire Department from the death of one of their number by coming in contact with an electrical current passing through a wire belonging to the Western Union Telegraph Company. And in support (336) of that demoralization, I wish to say that the reports on the San Francisco fire show that although there were but

two firemen killed in that fire, the fact that the Chief of the San Francisco Fire Department was killed by falling walls before the alarm was turned in was a demoralization of that fire department and deprived them of the knowledge as to the location of valves in the water mains; and it is stated in the reports on that fire that demoralization and lack of knowledge were caused by this accident.

The death of the Chief of the Fire Department was largely responsible for what is known as the second fire, which proved to be the disastrous one. The same conditions surrounded the outbreak of the Baltimore fire, at which time a falling wire put the chief of that department out of commission immediately upon his arrival at the fire grounds. Up to the death of Mr. Wright, the members of the Richmond Fire Department had been told of dangers, but they took it for granted that they might be more fortunate than their neighbors; but the realization of seeing one of their number fall suddenly from the building, never to move, has impressed itself so deeply upon them that I am of the opinion that it will be years before we can expect the members of the Richmond Fire Department to be as fearless in the discharge of their duties in the presence of electrical wires whether they be high or low current, as they were before the death of Mr. Wright.

(337) Mr. TAGGART: We object to the answer as hearsay, and wholly incompetent, immaterial and irrelevant.

A. (Continued) I would like to say, Mr. Pollard, that my statement concerning the presence of the electrical current on the Western Union Telegraph wire running from the front of Murphy's Hotel to the Journal office, is a matter of positive evidence, as I was a witness to the cross, and know that the current was on the wire, and saw the position of the wires, before the cross was remedied.

Mr. TAGGART: We except to that last statement, as irrelevant, incompetent and immaterial.

18 Q. Were you present during the inquest held over the body of Mr. Wright?

Mr. TAGGART: Objected to as irrelevant, incompetent and immaterial.

A. I was.

19 Q. I now hand you what purports to be a copy of the verdict of the jury holding the inquest over the body of Wright.

Will you state what that paper is, and whether that is your understanding of the result of that inquest?

Mr. TAGGART: Objected to as irrelevant, incompetent and immaterial, and not the best evidence.

A. I saw a copy of the wording of this charge in the papers, but further than that I cannot identify the paper, although I will say that if I had been on that jury, I would have voted similar to those gentlemen who have signed it.

(338) 20 Q. That paper appears to have been certified by Walter Christian, Clerk of the Hustings Court of the City of Richmond, does it not? A. Yes, sir, I know his signature.

Said paper is here filed as exhibit "Lecky #2."

Exhibit "Lecky #2."

With deposition of Robert Lecky on behalf of City of Richmond.

JOHN G. WINSTON, N. P.

No. 6389.

CITY OF RICHMOND, } to-wit:

An inquisition taken at 1505 E. Main street in said City on the 22nd day of June, 1906, before me, Dr. Wm. H. Taylor, Coroner, upon the view of the body of Eugene M. Wright, there lying dead. The jurors sworn to inquire when, how, and by what means the said Eugene M. Wright came to his death, upon their oath do say, that he came to his death on the 21st day of June, 1906.

They find that on the night of the twenty-first day of June, 1906, while he was on the roof of house 610 East Broad street, in the discharge of his duty as a fireman, he received an electric shock from a wire belonging to the Western Union Telegraph Company, which, because of that company's neglect, had become charged with electricity by contact with a high current wire belonging to the Virginia Passenger and Power Company, and that he then fell from the roof and fractured his skull; but they are unable to determine whether his death was caused by the shock or the fall. They are, however, of opinion that both the shock and the fall are to be attributed primarily to the disregard by the Western Union Telegraph Company and the Virginia Passenger and Power Company of

the ordinance of the City which requires electric wires in the locality to be put underground.

In testimony whereof the said Coroner and Jurors hereto set their hands and seals.

WM. H. TAYLOR, M. D., Coroner, [Seal]

W. W. MORTON, Foreman, [Seal]

CHAS. A. BROWN, [Seal]

S. S. ELAM, [Seal]

LEON DETTLEBACH, [Seal]

L. R. SMITH, [Seal]

JNO. E. GILMAN, [Seal]

A copy—Teste:

WALTER CHRISTIAN, Clerk.

Filed with depositions taken on behalf of the City of Richmond, Va., Jany. 10th, 1908.

JOSEPH P. BRADY, Clerk.

Mr. TAGGART: This paper is objected to as incompetent, irrelevant and immaterial.

21 Q. State, if you know, whether the overhead wires of the Western Union Telegraph Company are in near proximity to any of the chief hotels of the city.

Mr. TAGGART: Objected to as wholly incompetent, irrelevant and immaterial.

A. The overhead wires of the Western Union Telegraph Company pass sufficiently close to the eastern side of the Lexington Hotel, at the corner of 12th and Main streets, to prevent the proper use of the Richmond Fire Department's large aerial trucks. The same condition is true regarding the eastern and northern side of Murphy's Hotel annex, located at the southwest corner of Eighth and Broad streets. The wires of the Western Union Telegraph Company also pass near the western wall of the general offices of the Chesapeake & Ohio Railroad Company, on the southeast corner of Main and Eighth streets, and are in such proximity to the wall as to forbid the use of any apparatus or the introduction of streams into the upper stories of that building; and in this building there are

several hundred employees, all of whom would have to be res-
(339) cued from the Main street front, where there is an ob-
struction of high current power wires, or from the alley-way
in the rear, which is on such a grade as to prevent the use of
trucks from that point.

22 Q. State the importance and capacity of the two hotels
referred to by you?

Mr. TAGGART: *Object* to as immaterial and irrelevant.

A. The Lexington Hotel is five stories in height, on the
12th street side, and has an advertised capacity of two hundred
people. Murphy's Hotel, which in addition to the building
referred to, consists of the old Murphy's Hotel on the opposite
side of the street, has an advertised capacity of seven hundred.

Mr. TAGGART: Answer is objected to as hearsay.

23 Q. State whether or not you consider the location of
the wires of the Western Union Telegraph Company, adjacent
to the three buildings mentioned, a menace to life and property.

Mr. TAGGART: Objected to as wholly incompetent, imma-
terial and irrelevant.

A. I positively consider them a barrier to the proper exe-
cution of the work of the Fire Department, and also state as
my opinion, that, had the fire in the general office of the Ches-
apeake and Ohio which originated from the Western Union
Telegraph wires, occurred in the day time, with the rapidity
with which it burnt, we would perhaps have suffered the loss
(340) of life of some of its occupants, due entirely to the
presence of wires around the building preventing the use of
our life saving trucks.

Mr. TAGGART: Answer is objected to as non-responsive,
incompetent and irrelevant.

NOTE.—The cross examination of this witness is post-
poned to a later day.

The further taking of these depositions is adjourned to
Wednesday, the 12th day of December, 1906, at 11 o'clock A.
M.

JOHN G. WINSTON,
Notary Public.

NOTE.—Counsel for Western Union Telegraph Company having stated (on December 30th, 1907), that they did not desire to cross examine the witness Robert Lecky, his testimony is closed.

And further this deponent saith not.

ROBT. LECKY, JR.

Office of the City Attorney,

City Hall.

(341) Richmond, Va., December 30th, 1907.

The further taking of these depositions, which on December 12th, 1906, was postponed to such future time as might be agreed upon between counsel, was this day resumed, pursuant to such agreement.

Present: H. R. Pollard, City Attorney of the City of Richmond; George Wayne Anderson, Assistant City Attorney of the City of Richmond; Rush Taggart, A. L. Holaday, for Western Union Telegraph Company.

WILLIAM H. THOMPSON, a witness recalled on behalf of the City of Richmond, having been before duly sworn herein, deposes and says as follows:

DIRECT EXAMINATION (Continued).

By Mr. POLLARD:

72 Q. Mr. Thompson, you were examined as a witness (342) on behalf of the defendant in this case on the 27th day of November, 1906. I omitted at that time to ask you certain questions, about which I desire to have information at this time. In the evidence of Mr. Merrihew, a witness introduced on behalf of the plaintiff, I find that he stated that a serious objection to the use of terra cotta conduits for underground wires is, the likelihood of their being injured by digging into the street, that is, by persons digging into the street coming in contact unexpectedly with terra-cotta conduits and accidentally injuring them. Will you state whether or not, in your opinion, such danger exists, and if not, why not? A. It does not make any difference, to start with, whether it is terra-cotta, iron, or steel; all of it is enclosed in four inches of concrete,

and it is the concrete that we depend upon for the mechanical strength of the ducts, not the material of which they are made. We use it universally here, all of our conduits are terra-cotta throughout the city, and we cover it with concrete of the best quality, four inches thick, grout it with stones and sand, and that protects it from injury, you can't knock it open with a pick. If it is put down in the earth with no mechanical protection around it, of course you can go in it with a pick.

73 Q. State whether or not your observation shows that it is the practice to lay terra-cotta conduits in concrete construction? (343)

Mr. TAGGART: Note our objection as immaterial, irrelevant and incompetent.

A. Yes, sir, it is universally used that way.

74 Q. To what extent are terra-cotta conduits laid in this city?

Mr. TAGGART: Question objected to as immaterial.

A. The majority of the conduits used in the city of Richmond with the exception of a little piece owned by the city and a little piece owned by the Postal Telegraph, are all terra-cotta, vitrified clay.

75 Q. Laid in concrete construction? A. Laid in concrete construction, the specifications call for it always.

76 Q. Are any companies owning electrical wires, now placing conduits in the city for such wires?

Mr. TAGGART: Objected to as immaterial and irrelevant.

A. The conduit system is being continually added to day by day, with terra-cotta concrete construction.

77 Q. Name what companies are doing that construction?

Mr. TAGGART: Objected to as immaterial.

A. The Southern Bell Telephone and Telegraph Company, the Richmond Railway and Development Company and the City of Richmond.

78 Q. State what progress during the last twelve months, that is, since your former testimony, has been made in the matter (344) of placing wires underground within the underground territory in the city of Richmond by companies other than the Western Union Telegraph Company?

Excepted to by counsel for plaintiff as irrelevant and immaterial.

A. I am glad to report that great progress has been made both by the Electric Light and Telephone Companies, and the city, in placing their wires underground within and outside of the conduit district.

79 Q. You mean by the "conduit district," the underground territory? A. Yes, sir. Many miles of it have been down outside of the conduit district.

80 Q. In what conduits have they been placed?

Counsel for plaintiff objects to the question, as irrelevant and immaterial.

A. Terra-cotta.

81 Q. What provision, in the laying of these conduits, if any, has been made for the carrying of the city's wires, under chapter 88 of the Richmond City Code, as amended?

Excepted to by counsel for plaintiff, as being wholly immaterial and calling for incompetent testimony.

A. All the companies reserve a space for the city's wires, and a percentage of the space in all the conduits is reserved to be allotted by the city, a certain percentage over what is absolutely necessary for the company's service as they put it down (345) is added to it and cannot be used by the companies or anyone else without the consent of the city.

82 Q. Is that requirement of the ordinance being complied with by the companies now placing wires underground?

Counsel for plaintiff except to the question as wholly immaterial and calling for incompetent testimony.

A. Yes, sir.

83 Q. What, in your judgment, is the comparative advantage of the terra-cotta conduit over a steel or iron conduit for the carrying of underground electrical wires?

Counsel for plaintiff objects to the foregoing question because it calls for an expression of opinion by the witness, as the witness has not been shown to have any experience, and also because it is incompetent and irrelevant.

Mr. POLLARD: The witness, in his former testimony, has testified as to his experience and knowledge in matters con-

cerning the proper construction and equipment of electrical wires, both overhead and underground.

A. Speaking from my eighteen years experience with iron, which I have had in practical use for that period, I would say it was all out of question of thinking of using iron or steel in the present day. Terra-cotta is much superior to it. Iron de-(346) teriorates very fast, and in a very few years it is entirely eaten away. Besides, it is subjected to electrolytic action, and liable to be eaten up from this source, as well as the salt and acids of the earth, while terra-cotta is not subjected to those difficulties.

84 Q. State whether or not terra-cotta has not the very decided advantage of being a non-conductor, while steel and iron are conductors of electricity?

Counsel for plaintiff objects to this question for the same reasons stated in the objection to the question next preceding, and also because the question is leading.

A. I have just answered that question. I will answer it again by saying that of course iron is a conductor, while terra-cotta is a non-conductor, and it is much preferable to iron for electrical purposes.

85 Q. Does not the fact of the material encasing the electrical wire being a non-conductor give a great advantage in the matter of economy, that is, in preventing the escape of the current?

Counsel for plaintiff except to this question on the same grounds as stated in the objection next preceding, and also because this question is argumentative as well as leading.

A. Undoubtedly so. It is much safer to put electrical conductors, leaden cases and cables and such things in terra-cotta than iron, in my judgment, both from the danger stand-(347) point, and that of maintenance.

86 Q. You mean, as I understand you, economical maintenance?

Counsel for plaintiff objects to this question because it calls for the expression of the opinion of the witness, who has not been shown to have any experience, and also because it is incompetent and irrelevant.

A. Yes, sir.

87 Q. Will you restate what opportunities you have had to study electricity and the appliances that best serve its use?

Counsel for plaintiff object to this question, as it is covered by the witness's previous examination.

A. I have been in the electrical service 28 years, grown up with the industry here in the city, and know theoretically and practically every detail connected with the electrical enterprises of the city. I helped install the first dynamo that was ever used in the city of Richmond, a model of which I have in my office. I also helped install the first telephone used in the city of Richmond, and built the model for the electrical railway, and have been both officially and socially associated with its enterprises since their birth in this city.

88 Q. Is it not a fact that the first electric overhead railway successfully operated in the United States, was operated in the city of Richmond?

Counsel for plaintiff object to this question as irrelevant, (348) immaterial and incompetent.

A. Yes, sir, from a commercial standpoint, but not an experimental standpoint.

89 Q. I said successfully?

Same objection, as being incompetent, irrelevant and immaterial.

A. Yes, sir.

90 Q. Do you mean to be understood as actively participating in installing and aiding in the direction of the equipment of that system?

Counsel for plaintiff object to the foregoing question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Plaintiff by counsel makes the separate motion to strike each answer given by this witness to the questions propounded to him this day, and assigns the reasons hereinbefore stated upon the face of the record.

Counsel for plaintiff state that they do not care to cross examine this witness.

And further this deponent saith not.

Signature waived.

(349) GEORGE C. SHAW, another witness introduced on behalf of the defendant, having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. Give your name, age, and residence? A. George C. Shaw, 49, 315 north 20th street, Richmond, Va.

2 Q. What official position, if any, do you hold in connection with the Richmond city government? A. Chief of the Fire Department.

3 Q. How long have you been Chief of the Fire Department? A. About a year.

4 Q. How long have you been connected with the Fire Department of the city of Richmond, and what other position, if any, have you held in connection with it? A. I am in my 25th year now; I was assistant chief about fourteen years, the remainder of the time I was station man, tiller-man of the truck; it has been about twenty-five years all told.

5 Q. State whether or not your experience in the matter of interference of electrical wires at times of conflagrations will justify you in speaking as to the necessity of placing electrical wires underground within the underground territory of the city of Richmond?

(359) Counsel for plaintiff object to this question as wholly immaterial and irrelevant.

A. They are very dangerous overhead, and they are a handicap at times; they make the men timid, prevent them from raising ladders, and when that timidity overcomes the men, it goes from one to another, and they don't take the same precaution, they are backward in going into fires, and I think very naturally, if a man thinks he is going to get killed. It was demonstrated last night; we had a fire, the wires fell and all of them were alive; a portion of the building fell and carried the wires with it, and there was such an amount of motor, dust and smoke and flash of electricity, that I got right in the bunch and threw out both hands and held them and said, "Don't move a peg, you don't know where you are going, if you put your foot on the wires it is certain death to you." A horse in the building at the time was burned so badly that when he got to the front door he fell, and a wire was lying across him; he was shot and put out of his misery. It was the most dangerous fire that I have ever been to. There were two wires lying right

in the middle of the street, I had one of the hose-wagons going to the fire, reeling off, and I had to go out of my path and go around and keep the men from them; if they had stepped on them, of course it would have killed them.

Counsel for plaintiff object to the answer as not being responsive to the question, and also because it is wholly immaterial, irrelevant and incompetent.

(351) A. (Continued) On one occasion we had a fire, and we had one killed from an electrical wire.

6 Q. How did that happen?

Counsel for plaintiff object to this question as wholly immaterial, irrelevant and incompetent.

A. He was on top of the building and the wire was arcing; he went up to remedy this trouble, and I think the electric people call it haltering the wire—they put a rope around it to fasten it, pull it away from other wires, and he caught hold of that wire, being engaged in that business before he came to us; he caught hold of this wire or this rope—I was on the ground, he was on the second story; when he went up the ladder I told him to be careful, and he said, "Yes, sir." That was the last word he spoke, and he leaned over to remedy this trouble and when he raised up he had the wire in his hand, and he was thrown off the building and he was dead before he hit the ground, he didn't breathe a breath, all from this wire.

Counsel for plaintiff object to this answer as incompetent.

7 Q. What was the name of this fireman to whom you refer?

Counsel for plaintiff object to this question as wholly immaterial, irrelevant and incompetent.

A. His name was Mr. Wright.

8 Q. State whether or not his hand showed that it was burned by electricity?

Counsel for plaintiff object to the question as wholly immaterial, irrelevant, and incompetent.

(352)

A. It was burned to a crisp, right there where he had this wire, where the wire struck him. I got to him as quick as I

could and carried him in a gentleman's store, but there was not a spark of life in him, not a spark.

Counsel for plaintiff object to the answer as wholly immaterial, irrelevant and incompetent.

9 Q. What locality was this? A. That was on the north side of Broad street.

Counsel for plaintiff except to the question and answer as wholly immaterial, irrelevant and incompetent.

10 Q. Between what streets?

Counsel for plaintiff except to the question as wholly immaterial, irrelevant and incompetent.

A. Between 6th and 7th.

11 Q. What was the character of the wire, was it a low tension wire, or a high tension wire?

Counsel for plaintiff object to this question as wholly immaterial, irrelevant and incompetent.

A. That I cannot answer; our electrician can tell you, he being better familiar with those things, he examined it after everything was over, he took it up where we left off.

Counsel for plaintiff except to the answer as being wholly irrelevant, immaterial and incompetent.

12 Q. From your experience as a fire-fighter, state whether (353) or not, in your judgment, the presence of electrical wires overhead at times of conflagrations seriously impedes the extinguishment of fires?

Counsel for plaintiff except to this question as calling for illegal and incompetent testimony, and because the witness has not shown himself qualified to testify upon this subject.

A. Yes, sir.

13 Q. Now, state your reasons for so believing?

Counsel for plaintiff except to this question for the same reasons stated in the exception to the previous question.

A. It has been demonstrated by the action of the men.

Counsel for plaintiff except to this answer as wholly irrelevant, incompetent and immaterial.

14 Q. What do you mean by the action of the men?

Counsel for plaintiff object to the question as calling for immaterial, irrelevant and incompetent testimony.

A. Just as I stated before, they show timidity about going forward, they don't know what minute they will be killed, and when you see a wire dangling down and know it is alive, you know it is certain death if you touch it. The current will follow the stream of water if you hit it with a stream of water. On another occasion we had a wire, it was on Main street, it fell and killed a dog just below the fire.

Counsel for plaintiff object to this answer as wholly immaterial, irrelevant and incompetent.

(354) 15 Q. You have stated that at times the current, I suppose you mean the current of electricity, would follow the stream of water. Do you or not mean that the electricity on the charged wire, coming in contact with the current of water, will follow the current to the hose and down the hose to the hand of the fireman who is holding it to deliver it at the fire?

Counsel for plaintiff except to this question because the witness has not shown himself qualified to testify upon this subject, and because it calls for illegal and incompetent and irrelevant testimony, and also because it is argumentative, suggestive and leading to even a remarkable degree.

A. Yes, sir.

16 Q. Have you known that actually to happen in your experience?

Counsel for plaintiff make the same exception to this question as to the preceding question.

A. Yes, sir. That has been demonstrated in our department, but not while I was at the fire, you understand, but I have read accounts of it in our Fire Journals, that this electricity would follow the water down to the metal pipe. I can give you the name of the man who had hold of the pipe here, to tell you all about this current following that stream down, but I was not at the fire at the time, that was before I was made chief.

Plaintiff, by counsel, objects and excepts to the answer, (355) for the reasons hereinbefore stated, and moves to strike out same for those reasons, and because the answer is hearsay and illegal and incompetent.

17 Q. What is the name of the man to whom you refer?

Counsel for plaintiff objects to question as wholly incompetent, immaterial and irrelevant.

A. Redwood.

Counsel for plaintiff excepts to the answer for the same reason.

18 Q. Give his full name, if you please?

Counsel for plaintiff excepts to this question because the same is wholly immaterial, incompetent and irrelevant.

A. John H. Redwood.

Counsel for plaintiff except to the answer for the same reasons.

19 Q. Will you please have him produced?

Counsel for plaintiff excepts to this question for the same reasons.

A. I don't know that I can get him now, he is one of our call men, he is not in our station force, I can put my hand on each one of our station force.

Counsel for plaintiff except to the answer for the same reasons.

20 Q. You have alluded to the inconvenience occasioned by the presence of overhead wires when it became necessary to raise ladders in fighting fires. Do you know specific instances in which this has caused delay and difficulty?

Excepted to by counsel for plaintiff as calling for illegal and incompetent testimony.

A. Well, I can't just recall the fire, but quite often I would have to take the ladder and lay it parallel with the pavement

and raise it from the pavement; it would interfere so I couldn't raise it outside.

Counsel for plaintiff except to this answer for the same reasons.

21 Q. Would that necessarily delay fighting the fire?

Counsel for plaintiff except to this question for the same reasons as last stated.

A. That delays getting the ladder in proper position.

Counsel for plaintiff except to this answer as wholly illegal, incompetent and irrelevant and immaterial.

22 Q. You spoke of a fire occurring last night; what was the location of that?

Counsel for plaintiff object to this question as wholly incompetent, irrelevant and immaterial.

A. 17th and Cary, the building was formerly used as a machine shop, converted into a wood and coal establishment, conducted by a man by the name of Blacker.

Counsel for plaintiff except to this answer for the reasons last stated.

23 Q. What was the character of the wires there which were brought to the ground by the falling walls?

(357) Counsel for plaintiff except to this question for the same reasons.

A. That I can't tell you. The superintendent could tell you, he had his men down there trying to relieve me of the trouble, he had to get these wires out of my way.

Counsel for plaintiff object to this answer for the same reason.

24 Q. Who cut the wires?

Counsel for plaintiff except to the question for the same reasons.

A. The electrical people, Mr. Thompson's force, we had that force with us.

Counsel for plaintiff except to the answer for the same reasons.

25 Q. What was the name of the man?

Counsel for plaintiff except to this question for the same reason.

A. Gullett and Randolph; it was others there with them, you understand.

Counsel for plaintiff except to this answer for the same reasons.

26 Q. Did you and your force on last evening find yourselves embarrassed and impeded by the presence of the wires referred to?

Counsel for plaintiff object to this question as calling for illegal, incompetent and irrelevant testimony.

(358) A. Very much so, yes, sir; so much so that I considered it was endangering the men's lives to ask them to go where I wanted them to go.

Counsel for plaintiff except to this answer as illegal, incompetent and irrelevant.

27 Q. State whether or not you found difficulty in inducing them to go in the face of the dangers you refer to?

Counsel for plaintiff except to this question as calling for illegal, incompetent and irrelevant testimony.

A. The word, "Watch out for the wires" went around from one mouth to another as fast as it could, and that produced that timidity among them.

Counsel for plaintiff object to this answer as illegal, incompetent, irrelevant and immaterial.

Judge HOLLADAY: Plaintiff by counsel makes the separate motion to strike out and suppress each answer given by the

witness to each of the foregoing questions, and assigns for reasons for said motion the reasons hereinbefore stated.

Counsel for plaintiff state that they do not wish to cross examine the witness.

And further this deponent saith not.

Signature waived.

(359) JOHN H. FRISCHKORN, another witness introduced on behalf of the defendant, having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. Mr. Frischkorn, give your full name, age and residence. A. John H. Frischkorn, 59 years old, 2008 Jefferson Park, Richmond, Va.

2 Q. What official position, if any, do you occupy in connection with the Richmond City Government? A. President of the Board of Fire Commissioners.

3 Q. How long have you been President of the Board of Fire Commissioners? A. Nineteen years and a half the first day of January.

4 Q. Has the occupancy of that office enabled you to judge of the necessity and propriety of the removal of overhead electrical wires from the streets of Richmond in the underground district? A. Yes, sir.

5 Q. Have you had opportunity to judge the conditions, in the matter of overhead wires, in fire fighting in other cities than Richmond? A. No, sir, except Baltimore, and I wasn't looking in that direction at all, I just got there at the end of the fire.

(360) 6 Q. Have you studied the question of the best and most perfect methods of extinguishing fires, and the obstacles that ordinarily confront the efforts to extinguish fires? A. I think I have.

7 Q. How long have you studied that question? A. Twenty years officially.

8 Q. State whether or not, in your judgment, with that experience, and with your experience and observation and study, the presence of overhead wires within the territory known as the underground territory in the City of Richmond embar-

rasses the operations of the Fire Department in times of conflagration?

Counsel for plaintiff except to this question as calling for illegal, irrelevant and incompetent testimony.

A. Yes, sir.

9 Q. State why the presence of overhead wires embarrasses the operations of the Fire Department in times of conflagration?

Counsel for plaintiff except to this question as calling for illegal, incompetent and irrelevant testimony.

A. Well, in the first place it produces a panicky condition among the men; they see animals and even members of the department killed by the influence of these shocks. I was at a fire last night—I go to them all—and saw the results of heavy voltage wires coming down among them; it simply terrorized the whole band and of course it handicaps them to that extent. And it is a dangerous proposition from start to finish, where men are going through invisible nets of wires, heavily charged, liable to be killed in a second.

Counsel for plaintiff except to this answer, as illegal, incompetent and irrelevant.

10 Q. At what point was the fire to which you referred as having occurred last night? A. Seventeenth and Cary.

11 Q. Did the Department, or not, find that the wires embarrassed the proper and convenient use of the fire engines and hose?

Counsel for plaintiff except to this question, as calling for illegal, irrelevant and incompetent testimony.

A. I think so, yes.

Counsel for plaintiff object to the answer upon the ground that the same is illegal, incompetent and irrelevant.

12 Q. Have you any doubt on that subject?

Counsel for plaintiff except to this question upon the ground that the same calls for illegal, incompetent and irrelevant testimony.

A. None in the world.

Counsel for plaintiff object to the answer as illegal, incompetent and irrelevant.

(362) 13 Q. You have spoken of high voltage wires. State whether or not it is true that a wire ordinarily carrying a low voltage, coming in contact with a high voltage wire, would be as dangerous as the high voltage wire?

Counsel for plaintiff except to the foregoing question, upon the ground that the same calls for illegal, incompetent and irrelevant testimony.

A. Yes, sir.

Counsel for plaintiff except to the foregoing answer, upon the ground that the same is illegal, incompetent and irrelevant.

14 Q. Is that true?

Counsel for plaintiff except to the foregoing question, upon the ground that the same calls for illegal, incompetent and irrelevant testimony.

A. Yes, sir. My attention was called last night to a wire that our telegraph people said carried a voltage of five thousand.

Counsel for plaintiff except to the foregoing answer, upon the ground that the same is illegal, incompetent and irrelevant.

15 Q. What do you mean by "our telegraph people"?

Counsel for plaintiff object to the foregoing question, upon (363) the ground that the same calls for immaterial, irrelevant and incompetent testimony.

A. We have our telegraph people who attend all fires, and that being entirely in their jurisdiction they telephoned the people who owned the wires, the Passenger & Power Company; they were feed wires; they came down there and stopped it after a while, but long after the crux of the fire, the fire was under control then. I could see where it was flashing against a house, and I told the men "Don't strike that wire with a stream of water; if you do, you will get a shock;" and we were pushed back in every direction by wires lying along the ground that they said were heavily charged. I have had experience along that line even in the day time.

Counsel for plaintiff except to the foregoing answer as illegal, immaterial, irrelevant and incompetent.

16 Q. You spoke of having cautioned the men not to let the streams of water go against the charged wires. Why was that?

Counsel for plaintiff object to the foregoing question as calling for illegal, irrelevant and incompetent testimony.

A. They would receive a shock.

Plaintiff by counsel excepts to the foregoing answer as illegal, irrelevant and incompetent.

(364) 17 Q. How communicated?

Plaintiff by counsel, excepts to the foregoing question, upon the ground that the same calls for incompetent, illegal and irrelevant testimony.

A. By the flow of the stream.

Counsel for plaintiff except to the foregoing answer, upon the ground that the same is illegal, incompetent and irrelevant.

18 Q. The current, as I understand you, will take the stream of water as a conductor?

Plaintiff by counsel excepts to the foregoing question as calling for illegal, incompetent and irrelevant testimony, and also because it is leading.

A. Yes, sir.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is illegal, incompetent and irrelevant.

19 Q. In that manner it would reach the hose and communicate itself to the man handling it?

Counsel for plaintiff except to the foregoing question, upon the ground that the same calls for illegal, incompetent and irrelevant testimony, and also because it is leading.

A. Yes, sir.

Plaintiff by counsel excepts to the foregoing answer, upon (365) the ground that the same is illegal, incompetent and irrelevant.

20 Q. Are you familiar with the confines of what is known as the underground territory of the City of Richmond? A. As it is laid down in the ordinance, the bounds of it.

21 Q. State whether or not, in your judgment, that is a conservative territory.

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same is immaterial, irrelevant, and not a proper subject for the expression of an opinion by the witness.

A. I think so, yes.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is immaterial, irrelevant, and not the proper subject for expression of opinion.

22 Q. State whether or not, in your judgment, that territory ought to be enlarged for the protection of property and life?

Plaintiff by counsel excepts to the foregoing question, upon the ground that it calls for immaterial, and irrelevant testimony, and is not a proper subject for an expression of opinion.

A. I do.

Plaintiff by counsel excepts to the foregoing answer, upon (366) the ground that the same is immaterial, irrelevant, and the subject is not a proper one for the expression of an opinion.

23 Q. State what is the character, mainly, of the territory now known as the underground territory, as to its being thickly built up and populated, or with reference to the business of the city.

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for irrelevant and incompetent testimony, and is not a proper subject for the expression of an opinion.

A. Well, I would suppose it is the most congested part of the commercial territory of Richmond.

Plaintiff by counsel excepts to the foregoing answer, upon the same grounds as those stated in the exception to the question.

24 Q. Is not that undoubtedly true, that it is the most congested part of the city?

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for immaterial and incompetent testimony, that the subject is not a proper one for the expression of an opinion, and also because the question is suggestive and leading.

A. Yes, sir.

(367) Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same immaterial and incompetent, and the subject is not a proper one for the expression of an opinion.

25 Q. As a matter of fact, state whether or not the presence of overhead wires, even supposing they carry no electrical currents, would materially interfere with the raising of ladders at fires?

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for immaterial, irrelevant and incompetent testimony.

A. Yes, sir, it happens all the time.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is immaterial, irrelevant and incompetent.

26 Q. How?

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for immaterial, incompetent and irrelevant testimony.

A. Simply because when we undertake to raise the ladders, we come in contact with the wires, and that either prevents them from raising them, or they try to get them in another position which is frequently ineffectual, and frequently causes great delay. I have know them to carry them along the side (368) of the house and try to elevate them at that position; of course that makes it difficult.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is immaterial, incompetent and irrelevant.

27 Q. State whether or not time is an essential element in fire fighting?

Plaintiff by counsel excepts to the foregoing question as calling for irrelevant, immaterial and incompetent testimony.

A. I think so.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is irrelevant, immaterial and incompetent.

28 Q. Then is it not a fact that whatever delays, materially impedes the extinguishment of a fire?

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for irrelevant, immaterial and incompetent testimony.

A. Oh, yes, sir, certainly.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is irrelevant, immaterial and incompetent.

Counsel for plaintiff then stated that they did not desire to cross examine this witness.

And further this deponent saith not.

Signature waived.

(369) JOHN H. REDWOOD, another witness introduced on behalf of the defendant, having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

1 Q. Mr. Redwood, state your age, residence and occupation. A. I live at 2202 east Marshall street, will be sixty years of age next March, occupation real estate agent.

2 Q. State whether or not you have been connected with the Fire Department of the City of Richmond? A. Yes, sir, since 1870.

3 Q. In what positions? A. I first started in the Department as ladderman in the truck force, then went in steamer company No. 1 in 1876; in 1879 I was made Captain of that company and I have been there ever since.

4 Q. State whether or not you have been able to observe the effect of overhead wires in times of conflagration?

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for testimony which is wholly immaterial, incompetent and irrelevant.

A. Yes, sir, on one occasion particularly I have; that was at Lathrop's stable down here by the Seaboard Air Line, in (370) which there was a wire attached to iron posts going to the power house, from Broad street into the power house in the bottom there. One of my men was holding a stream right by me, and he struck that wire; immediately the current came and knocked him back to the ground. I don't know of any other occasion but that that I can state positively.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is wholly immaterial and incompetent, and irrelevant.

A. (Continued) Now I have had several instances of going through wires, particularly on buildings, but whether they were telephone, or telegraph, or electric wires—I mean railroad wires—I don't know.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is irrelevant, immaterial and incompetent.

5 Q. As I understand you, in your presence a fireman, engaged in directing a stream from a hose on a burning building received a shock by means of a current from a high potential wire pursuing the stream to the hose and along the hose into his hands?

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for irrelevant and incompetent testimony, and because the same is both suggestive and argumentative.

(371) A. He had hold of the taper where the water comes out. Our tapers are brass, and we were playing then not on the building but on the Seaboard Air Line trestle, which was only, I suppose, twenty-five feet high, and this wire running to the power house was on it.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is irrelevant, immaterial and incompetent.

6 Q. What do you mean by the taper?

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for testimony, which is irrelevant, immaterial and incompetent.

A. We attach the taper to the hose. The hose is two and a half inches in diameter, the taper is three-quarters of an inch, or an inch, to reduce the water, to make the stream strong. The taper has a brass tip on it six to eight inches long; the tapers, most of them, are made of brass covered with leather.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is irrelevant, immaterial and incompetent.

7 Q. As a matter of fact, what you call the taper is the nozzle to the hose?

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for irrelevant, immaterial and (372) incompetent testimony, and because the same is suggestive.

A. The taper is what we call the taper, and the nozzle is what we put on the end of the taper to reduce the size of the stream, to get force. Take a hose out here without a taper and the water wouldn't go half the height of this building; put the taper on and it will go over it.

Plaintiff by counsel except to the foregoing answer as irrelevant, immaterial and incompetent.

8 Q. Then, as I understand you, the fireman to whom you referred as having been shocked was holding in his hand the taper or nozzle of the hose?

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Plaintiff by counsel excepts to the foregoing question as calling for irrelevant, immaterial and incompetent testimony.

A. Yes, sir.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is irrelevant, immaterial and incompetent.

9 Q. And the electrical current was conducted by means of the stream of water from the wire to the fireman who held the taper, am I correct?

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for immaterial, illegal, incompetent and irrelevant testimony, and also upon the ground that the question is argumentative, suggestive and leading.

(373) A. Yes, sir.

Plaintiff by counsel excepts to the foregoing answer, upon the ground that the same is immaterial, irrelevant and incompetent.

Counsel for plaintiff then stated that they did not desire to cross examine this witness.

And further this deponent saith not.

Signature waived.

(374) BEN T. AUGUST, a witness recalled on behalf of the defendant, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. POLLARD:

Q. Mr. August, please state what position you occupy under the city government? A. City clerk.

2 Q. I now hand you a printed copy of an ordinance, entitled,

"An Ordinance, approved December 16th, 1905, to amend chapter 88 of the Richmond City Code 1899, concerning wires, poles, conduits, etc., in, over and under the streets, so as to add a new section thereto providing that the rights and privileges

secured to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866, shall not be affected by said chapter."

Please examine the same and state whether or not the same was printed by the authority of the city of Richmond?
A. (Examining) Yes, sir.

3 Q. You say it was? A. Yes, sir. I regard it as printed by authority of the city of Richmond; it is printed by me, (375) I print all ordinances; it is an ordinance of the city of Richmond.

4 Q. Please hand the copy to the notary to be filed as a part of your deposition.

Witness hands said copy of ordinance to notary, and the same is accordingly filed, marked, "Exhibit B. T. A. #1."

Exhibit "B. T. A. No. 1."

Filed with deposition of B. T. August Dec. 30, 1907.

JNO. G. WINSTON, N. P.

AN ORDINANCE.

(Approved December 16, 1905.)

To amend Chapter 88 of Richmond City Code 1899 concerning wires, poles, conduits, etc., in, over and under the streets, so as to add a new section thereto providing that the rights and privileges secured to Telegraph Companies which have accepted the provisions of the Act of Congress of July 24, 1866, shall not be affected by said Chapter.

Be it ordained by the Council of the City of Richmond:—

1. That Chapter 88 of Richmond City Code, 1899, shall be amended so as to add a new section to the end of said Chapter in the words and figures following:

34. None of the obligations, burdens and restrictions of this Chapter shall, in any manner, interfere with or destroy the rights and privileges secured to Telegraph Companies which have accepted the provisions of the Act of Congress of July 24, 1866.

2. This ordinance shall be in force from its passage.

Filed with depositions taken on behalf of the City of Richmond, Va., Jany. 10th, 1908.

JOSEPH P. BRADY, Clerk.

5 Q. Please examine the Code of the City of Richmond of 1899, and point out the section and chapter under which you are directed to print all ordinances? A. Well, I don't know that I can find it.

6 Q. Please examine section 10 and 11 of chapter 7 of the Richmond City Code of 1899, and state if this particular ordinance was printed and certified by you in compliance with those sections of the chapter referred to?

Plaintiff by counsel objects to the foregoing question, upon the ground that the same calls for the conclusions and opinion of the witness, and because the same calls for testimony which is not the best evidence, and because the evidence called for is illegal and incompetent.

A. Well, I think, Mr. Pollard, this refers to printing this book every two years.

7 Q. I understand, but I ask you if this was printed in accordance with that? A. No, sir, that particular ordinance was not necessarily printed under this direction.

(376) 8 Q. Please read to the notary the sections referred to. A. (Reads)

"10. The city clerk shall keep an index of such ordinances or joint resolutions as have passed, and on the first day of July, eighteen hundred and seventy-six, shall arrange them according to their appropriate subjects, classifying and collecting them together, and shall have them bound in one or more volumes, as may be necessary, marked: Ordinances, from July, eighteen hundred and seventy-four, to July, eighteen hundred and seventy-six; and he shall index, collect, and classify, and have bound, the ordinances and joint resolution for every two years thereafter up to the first day of July biennially, so as to have all the corporate acts of each two years in a separate volume or volumes, properly and plainly marked.

11. These ordinances and joint resolutions, thus certified, signed, and enrolled, shall be taken to be the records of the corporation, and the city clerk shall cause all the ordinances to be printed, and with them such of the joint resolutions as are of a public nature, and having a continuing effect and use beyond the immediate occasion of their adoption."

(377) 9 Q. I now hand you a bound volume of what purports to be certain resolutions and ordinances of the Council of the City of Richmond, commencing with the month of August, 1904, and ending with the month of July, 1906. Please

examine that volume and state whether or not that volume is printed and bound by authority of the sections read by you?

Plaintiff by counsel excepts to the foregoing question, upon the ground that the same calls for incompetent and illegal testimony, and testimony which is not the best evidence.

A. (Examining) Yes, sir.

10 Q. Please now file that volume as an exhibit with your evidence?

Plaintiff by counsel excepts to the foregoing question, upon the ground that same calls for irrelevant, illegal and incompetent testimony, and testimony which is not the best evidence, and as encumbering the record with irrelevant matter wholly disconnected with the issues involved in the controversy.

Mr. POLLARD: To which counsel for defendant replies that by the authority of section 3331 of the Code of Virginia 1887, this evidence is introduced by reason of the inability of counsel for the defendant to be able to agree with counsel for the plaintiff that the ordinance sought to be introduced in the evidence had been duly adopted by the Council of the City of (378) Richmond, and duly published as such, and the evidence is now offered in the form it is, in order to meet the requirements of said section 3331 of the Code of Virginia.

A. Yes, sir.

Witness hands said book to notary and same is filed as "Exhibit B. T. A. #2."

11 Q. Please now refer to the volume filed by you as an exhibit marked "B. T. A. #2," page 182, and identify that as the same ordinance the printed slip of which was first handed you for examination, marked, "Exhibit B. T. A. #1."

Plaintiff by counsel moves to strike out and reject the volume of ordinances filed by the witness, and excepts to the question upon the ground that the same calls for illegal and incompetent testimony, and as seeking to prove an alleged ordinance in an illegal and incompetent manner.

A. Yes, sir, it is.

CROSS EXAMINATION.

By Judge HOLLADAY:

1 XQ. Have you any independent recollection in regard to the contents and publication of the paper filed by you as, "Exhibit B. T. A. #1"? A. No, sir, none at all.

(379) 2 XQ. Have you any independent recollection of the alleged ordinance referred to by you in the book filed by you on page 182, entitled,

"An Ordinance, approved December 16, 1905. To amend Chapter 88 of Richmond City Code 1899, concerning wires, poles, conduits, etc., in, over and under the streets, so as to add a new section thereto providing that the rights and privileges secured to Telegraph Companies which have accepted the provisions of the Act of Congress of July 24, 1866, shall not be affected by said Chapter."

A. You mean, independent of the papers themselves those two papers?

3 XQ. Yes, independent of those two papers? A. None at all, no, sir. My testimony is entirely based on those two papers; I have no independent recollection of it at all.

4 XQ. You have not intended to state, as we understand, that the papers filed by you are original papers in your office? A. Yes, sir, I most emphatically state that they are not original papers.

5 XQ. Do you, as city clerk, keep papers of original entry showing ordinances adopted by the City Council? A. Yes, sir.

And further this deponent saith not.

Signature waived.

STATE OF VIRGINIA, }
City of Richmond, } ss:

(380) I, John G. Winston, a Notary Public in and for the city of Richmond, in the State of Virginia, do certify that the foregoing depositions were duly taken and sworn to before me on the dates and at the place stated in the caption, and that the depositions of the witnesses H. M. Smith, Carlton McCarthy and Robert Lecky were afterwards duly signed before me, the signatures of the remaining witnesses being waived by consent of parties by counsel. Given under my hand this tenth day of January, 1908.

JOHN G. WINSTON,
Notary Public.

Fee of Notary & Stenographer, \$70.00.

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Opinion of the Court.

Filed December 9th, 1909.

In the Circuit Court of the United States for the Eastern District of Virginia.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
CITY OF RICHMOND, Defendant.

Rush Taggart, Addison L. Holladay, Solicitors for Complainant.
H. R. Pollard, Solicitor for Defendant.

285 *GOFF, Circuit Judge:*

The Western Union Telegraph Company, a corporation organized under the laws of the State of New York, filed the bill in this case against the City of Richmond, a municipal corporation existing under the laws of the State of Virginia. The cause of action is alleged to be between citizens of different States, and also as arising under the Constitution and laws of the United States.

It is claimed that complainant has been since the year 1851, engaged in the construction and operation of telegraph lines in all the states and territories of the United States, and in the Dominion of Canada; and that in connection with submarine cables it has telegraphic communication with foreign countries; that its system comprises over 192,000 miles of poles and cables, over 900,000 miles of wire, over 23,000 offices, and that it transmits annually about 65,000,000 messages for the public, for the Government of the United States, and for the governments of foreign countries; that as part of its system, connecting with its main office in the City of New York and thence to all the commercial centres of the world, it has constructed and now operates a telegraph line over and along the streets and alleys of the defendant City.

The bill alleges that, by an Act of the Congress of the United States, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," the provisions of which are substantially incorporated in Sections 5263 to 5269 inclusive, of the Revised Statutes of the United States, it was provided:

"SEC. 5263. Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and

maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

"SEC. 5264. Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"SEC. 5265. The rights and privileges granted under the provisions of the act of July twenty-four, eighteen hundred and sixty-six, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," or under this title, shall not be transferred
287 by any company acting thereunder to any other corporation, association, or person.

"SEC. 5266. Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

"SEC. 5267. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of the act of July twenty-fourth, eighteen hundred and sixty-six, entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," or under this Title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"SEC. 5268. Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law.

"SEC. 5269. Whenever any telegraph company, after hav-
288 ing filed its written acceptance with the Postmaster-General of the restrictions and obligations required by the act approved July twenty-fourth, eighteen hundred and sixty-six, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," or by this Title, shall, by its agents or employés, refuse or neglect to transmit any such telegraphic communications as are

provided for by the aforesaid act, or by this Title, or by the provisions of section two hundred and twenty-one, Title "The Department of War," authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and force of storms, such telegraph company shall be liable to a penalty of not less than one hundred dollars, and not more than one thousand dollars for each such refusal or neglect. (To be recovered by an action or actions at law in any district court of the United States.)"

Complainant shows that by an Act of Congress approved June 8, 1872, all the waters of the United States during the time the mail is carried thereon; all railways and all parts of railways, all canals and plank roads, and all letter carrier routes established in any city or town for the collection and delivery of mail matter by carriers, were declared by Congress to be "post-roads," and that by an Act of Congress, approved March 1, 1884, "all public roads and highways, while kept up and maintained as such," were declared to be "post-roads."

Complainant says that complying with the provisions of the Act of July 24, 1866, it on or about the 8th day of June, 1867, duly filed its written acceptance with the Postmaster-General of

289 the United States, of the restrictions and obligations of that Act, and that thereby it became entitled to all the rights and privileges conferred by it, and burdened with all the obligations imposed by it, and that it has continuously, since the filing of that acceptance, fully performed all the obligations and requirements of that Act.

Complainant alleges that in compliance with the legislation mentioned, it has at all times carried for the Government of the United States, over its lines situated along the streets and alleys of the City of Richmond, referred to in Chapter 88 of the Richmond City Code of 1899, and especially the streets and alleys named in the ordinance entitled "An ordinance to amend and reordain section 27 of chapter 88, Richmond City Code, (1899) requiring Telegraph, Telephone and Electric light and power wires to be placed underground on certain streets of the City," approved March 15, 1902, at rates far below the reasonable rates charged to and paid by individuals for similar services, communications relating to the meteorological and signal service, from the various stations thereof.

Complainant claims that all the streets and alleys of the City of Richmond, are post-roads within the meaning of said Acts of Congress, and that complainant has the right to construct, maintain, and operate lines of telegraph over and along all of them, in such manner as not to interfere with the ordinary travel thereon; that the grant by the United States in and by the legislation mentioned, of the right to construct, operate and maintain its lines of telegraph upon all streets and alleys of the City of Richmond was made upon a full, valuable and continuing consideration, paid and rendered by complainant to the United States; such consideration was the

290 agreement of complainant shown by its acceptance of the Act of Congress, and by the full and complete performance by it of all the duties imposed by the Congress; that thereby the right granted to complainant to construct and operate its lines of telegraph over and along said streets and alleys became complete and vested, and is in full force and effect; that its lines have been constructed so as not to interfere with the ordinary travel on the streets and alleys mentioned, and that it is entitled to all the rights, powers and privileges conferred by the Act of Congress of July 24, 1866.

The bill then recites that the defendant has enacted an ordinance concerning wires, poles and conduits, in, over and under the streets of Richmond published as Chapter 88 of the Code of that City, and has also passed certain amendments thereto, which are alleged to be grossly unreasonable and illegal; that they are in violation of and repugnant to Article 1, section 8, of the Constitution of the United States, and of Article 14, section 1, of Amendments to that Constitution; that they violate the Act of Congress, approved July 24, 1866, as also the other Acts of Congress that have been referred to; that they impose unreasonable and illegal burdens and obstructions upon foreign and interstate commerce, and that they deprive complainant of the rights, privileges and property guaranteed to it by the Constitution and Statutes of the United States.

Complainant charges that said ordinance, each and every section thereof, and all amendments thereto, are unreasonable, unjust, illegal and void for the following reasons: the City of Richmond is at no appreciable expense in issuing licenses under the ordinance, or in inspecting and supervising the poles, wires and other appliances of complainant; the charges imposed are not based on any proper estimate of the costs and expenses of the City because of such inspection and supervision, but are enormously in excess of any amount that could be incident to such expenditures, and as could properly be incurred in connection with reasonable precautions required for the safety of the public; the poles, wires and other appliances are so located as not to interfere with any kind of traffic, are not old and decayed, but new and sound, and cause no fear of accident, and are kept in good order by complainant for its own protection; that all provisions of the ordinance and of all sections and amendments thereof, requiring complainant to construct and maintain conduits and run its wires therein, and imposing charges on the same, and requiring the removal of the poles, wires and other appliances, from the streets and alleys are unreasonable and illegal, and deny to and deprive complainant of its rights, powers and privileges under the constitution and laws of the United States; that such charges are enormously more than can lawfully be imposed under any right held by the defendant to make charges for legal purposes; that complainant is paying the City the same property tax on its wires, poles and other appliances which is imposed on other corporations and citizens, and in addition is paying the large sum of \$500.00 per annum as a specific license tax, and that the fees, taxes and charges imposed by

said Chapter 88, with its amendments, are unreasonable and illegal; that by said Chapter the management of complainant's lines and the control of its business is taken largely out of its hands, and placed in charge of the City Engineer, and the Committee on streets, of defendant.

The bill sets forth in substance the different sections of said Chapter 88, complained of, and makes various allegations concerning some of them, to which reference is now made; that section 1, provides that the City Engineer is to determine the size, quality, character, 292 number and location of complainant's poles, before they can be erected, and is authorized to order changes of location at any time. Complainant alleges that the power so given the Engineer, is absolute and final, no provision being made to appeal from his decision, however unreasonable and burdensome it may be; that section 2 provides that all poles now erected for the support of wires, except such as support wires required by the City ordinances, shall be allowed to remain only upon terms and conditions in said ordinance mentioned, and this section it is charged, practically annuls the Act of Congress of July 24, 1866; that under section 4, the Committee on Streets can require complainant to allow other persons or companies, to put such wires upon its poles, as will not in the opinion of that committee unreasonably interfere with complainant's business, upon such terms and conditions as may be agreed upon between the parties interested, which complainant says is unreasonable, as the committee is made the absolute judge as to the interference referred to, and no provision for an appeal is provided, and complaint is also made of the method of securing an arbitration of such matter should the parties fail to agree among themselves; that section 5, gives the City Engineer absolute and final power to determine the size, quality, number, location, and manner of erecting all poles, with no provision for an appeal, however unreasonable and arbitrary his action may be; that section 6 provides that the City shall have the right to run all wires needed for its fire-alarm and police departments, on all poles allowed to remain on any street or alley, and in such places on the poles as shall seem proper to the superintendents of those departments, the allegation being that no compensation is to be made by the City to complainant for this use, and that no limit 293 is fixed as to the number of wires that may be so placed; that section 8 gives the City Council the right to put at any time other restrictions and regulations as to the erection and use of poles, wires and other apparatus, to require other poles to be removed and the wires thereon to be run in conduits, "upon such terms as the city may deem proper," no provision being made for an appeal, complainant saying that by acceding to the provisions of this section and of this ordinance, it would surrender its rights under the Constitution and laws of the United States, and submit itself to the mercy of the City; that section 10 requires that a fee of two dollars for each telegraph pole used and maintained in any of the parks, streets and alleys of said City, shall be paid annually to the Treasurer of the City, which complainant charges is a gross violation of its rights and privileges, and an unreasonable burden upon its foreign

and interstate commerce, and is largely more than could be legally charged as a rental for the space occupied by such poles, and enormously more than could be charged under any lawful form of taxation; that section 13 provides that any corporation using or maintaining such poles, which shall have failed by the 20th day of January of each year to pay said fee of two dollars per pole, shall be liable to a fine of not less than five, nor more than one hundred dollars, for each pole upon which it is in default, and that each day of default shall be a separate offense, the fines to be imposed by the Police Justice of the City; that section 25 provides that each and every provision of the ordinance, unless otherwise provided, shall apply to any pole, wire or other apparatus used in connection with the transmission of electricity, thereafter erected, whether the same be by way of repairs or for additional routes; that section 26 provides

294 that any person violating any restriction, provision, or condition imposed by, or failing to perform any requirement made under said chapter by the City Engineer, the Superintendent of Fire Alarm, or Chief of the Fire Department, concerning which there is not in the chapter a specific fine imposed, shall be liable to a fine of not less than ten dollars, nor more than five hundred dollars, to be imposed by said Police Justice, each day's violation or failure to be a separate offense; that section 27 as amended March 15, 1902, required all poles, wires and cables mentioned to be removed within twelve months from certain of the streets of the City of Richmond, embracing a large part of complainant's system, and placed underground, and directs that any such wires subsequently needed within said limits should be likewise so placed, and provides further that, any company owning or controlling such wires and poles, that shall refuse or neglect to so remove them, shall be liable to a fine of not less than one hundred dollars, nor more than five hundred dollars, for each pole so remaining, to be enforced by the Police Justice of the City, and for every week of continued failure to so remove after the imposition of such fine, such company is to be liable to a further fine of not less than one hundred dollars, nor more than five hundred dollars, complainant insisting that said section is grossly unreasonable, illegal, and in violation of its rights and privileges, and therefore null and void; that section 28 as amended December 18, 1903, requires complainant to not only go underground with its wires along the streets and alleys of the "underground territory" of the City, but also requires it to build conduits, not of a character satisfactory to complainant, nor adequate to its purposes, but satisfactory to the "Committee on Streets and Shockoe Creek," and to the City Engineer, and directs that such conduits shall be of sufficient capacity to accomodate the wires of complainant, as well as cer-

295 tain wires of the City, which are to be carried free of charge, one duct at least being reserved for that purpose; and further that the conduits shall be of sufficient capacity to accomodate other wires in the streets and alleys of such underground territory, and also provides for the increase of such wires to the extent of at least thirty per cent., but no matter what complainant's necessities may be, such increase is not to be occupied by it without the consent of said

Committee, while any other person or corporation, desiring to run wires therein may after obtaining the consent of that committee, occupy such portions of the conduits, upon terms as may be agreed upon by arbitration; that the provisions of section 30 are similar to those described in the preceding sections, are as unreasonable and as radical, and are intended to be enforced by excessive and illegal penalties; that 31 is one of the most objectionable sections, in which it is provided that no privilege as to the building of conduits shall last longer than fifteen years, at the expiration of which time the City may impose such other restrictions, conditions and charges, as it may see fit and shall be lawful, or may order their removal at the expense of the owner; that section 32 provides, that for the privilege of using and occupying the streets, each person or corporation, owning or using any wire or wires run in the conduits shall, each year until January 1, 1900, pay to the City Treasurer a sum equal to \$2.00 per wire per mile, and that after that date, the City Council reserves the right to charge such larger compensation for the residue of the term of the privilege as it may see fit; that said section also requires each person or corporation, to render to the City a sworn statement as to the number and length of each of said wires, the Committee

296 on Finance having the power to have examined the books of such person or corporation, to ascertain if the statement so made is accurate, severe penalties being imposed for failure to permit such examination; that section 33 contains a provision which removes the only limitation that the ordinance had provided, and states that the conduit system shall be extended from time to time, so as to cover streets and alleys upon which the Council may determine that no overhead wires shall be run, thereby placing complainant at the absolute mercy of the City.

The bill then proceeds to charge that the amendment to section 28, of December 18, 1903, required complainant to remove all of its poles, wires and other appliances for conducting electricity, within the district mentioned in section 27, as amended, within six months from the approval of said amendment to section 28, and as that period has expired, complainant not having complied with such requirements, is threatened by the defendant, through its attorney, and charges that the City intends to proceed forthwith to impose and collect the penalties provided for by said chapter 88, and that defendant is going to use the penal features of such enactments, in order to compel complainant to remove its poles and wires from the underground territory as described; that it has paid to the defendant the license tax of \$500.00 imposed for the current year, also the tax of \$2.00 per pole for said period, and all *ad valorem* and property taxes required of it; that no adequate remedy exists save in a court of Equity, and that irreparable injury will ensue unless defendant is enjoined from enforcing such penal features, and unless said ordinance and the sections especially referred to, are decreed to be unreasonable, null and void.

297 The prayer is that the City of Richmond be restrained from enforcing the provisions of any of the sections of the chapter of the City Code mentioned, or any of the amendments

thereto, and that the same may be declared to be unreasonable and illegal, and pending the hearing of an application for injunction, that a restraining order may issue.

The bill duly verified was presented to the court, on consideration of which the restraining order asked for was granted, by which the City of Richmond, its officers, agents and attorneys were restrained from enforcing the fines and penalties imposed by said Chapter 88, and the amendments thereto, and from removing from the streets and alleys of the City of Richmond, the poles, wires, cables and appliances of the complainant.

To this bill the defendant appeared and filed a demurrer, which after argument was overruled. I do not find it necessary to set forth in detail the grounds of the demurrer, the main points of which will be alluded to hereafter. The defendant incorporated in its answer, the points in substance on which it relied in the demurrer, which on the pleadings and evidence are now to be finally disposed of.

The answer admits the citizenship of the parties, and the amount in controversy, to be as alleged in the bill, and also that the case is one arising under the Constitution and laws of the United States. Defendant admits that all of the streets and alleys of the City of Richmond, along which complainant has erected its poles and strung its wires, are post-roads under the Act of Congress referred to, and under the Constitution of the United States, but denies the claim of complainant that under the same, by having accepted the provisions of that legislation, that complainant has the right to
298 construct and maintain its lines over and along said streets and alleys, without reference to the requirements of the Statutes of the State of Virginia, and the ordinances of the City of Richmond, as to the location and construction thereof; defendant insisting that according to the intent and meaning of the Act of Congress, and of the Statutes and Constitution of the United States, the complainant has no right except in conformity with the Statute of the State of Virginia and ordinances of the City of Richmond, to maintain its lines of telegraph upon and along the said streets and alleys; that the American Union Telegraph Company, of which complainant is the assignee and successor, claiming under the ordinance of the defendant of March 17, 1880, obtained by that ordinance permission to erect poles and run wires along and over the said streets and alleys, as provided for by the laws of the State of Virginia, the said assignor of complainant thereby recognizing its obligation to comply with such laws by applying to and obtaining the consent of the Council of the City of Richmond, therefore defendant charges that by its conduct and by accepting the privileges granted by the ordinance under which its assignor claimed, the complainant is estopped from insisting that the Virginia legislation referred to, and the ordinances of the City of Richmond, are in violation either of the Acts of Congress, or of the Constitution of the United States, and further that complainant is bound by the contract thereby entered into. Defendant admits that it has enacted said ordinance No. 88, and the amendments thereto as shown in the bill,

but denies that it, or the amendments thereto are unreasonable, illegal or in violation of the Act of Congress or of the Constitution of the United States, or of the complainant's rights and privileges; and claims in its answer that as the bill only charges that sections 27 and 28 are sought to be enforced, that all other questions involved in said ordinance are not now before the court. Defendant then specially replying to the complainant's allegations concerning the different sections of said ordinance, insists that the provisions of each and all of them are reasonable, and that the requirements and restrictions within them found are legal, being justified by the necessities of the City, required for the comfort and safety of its citizens, and are but the proper exercise by the City of its police power. Other charges and denials in the answer found are not essential to the proper disposition of the case, and consequently will not be particularly referred to.

With leave of the court an amended bill was filed which in substance elaborated the specific allegations of the original bill, and to this amended bill the defendant filed an answer, in all material matters the same as its original answer, but neither the amended bill nor the answer thereto will be set forth in detail.

Subsequently the defendant moved for leave to file an amended and supplemental answer, which the court refused to permit, but allowed a cross-bill to be filed, in which among other matters the City of Richmond sets forth that, by an ordinance of its Council approved December 16, 1905, it was enacted, "That Chapter 88 of the Richmond City Code 1899, shall be amended so as to add a new section to the end of said chapter in the words and figures following; 34, None of the obligations, burdens, and restrictions of this chapter shall, in any manner, interfere with or destroy the rights and privileges secured to telegraph companies which have accepted the provisions of the Act of Congress of July 24th, 1866."

To this cross-bill an answer was duly filed by the defendant,—the complainant herein,—in which it was insisted that notwithstanding such amendment, so passed as section 34, it would not be possible for complainant to proceed to take action under chapter 88, without subjecting itself to conditions and requirements which would interfere with the rights and privileges secured to it by the terms of the Act of Congress of July 24, 1866, and to the answer a replication was filed by the City of Richmond, and a replication by the complainant to the answer of defendant was filed. The case has been heard on the pleadings, depositions, exhibits and argument of counsel.

That the complainant under the Act of Congress of July 24, 1866, was entitled to use the streets and alleys of the City of Richmond, for purposes connected with its telegraphic system, is now so well established that the citation of authorities to sustain it will not be indulged in. That it had this right independent of any action by the City of Richmond, and without proceeding under the provisions of any legislation by the State of Virginia, is I think without question. To hold that the companies mentioned in said Act of Congress, are required to obtain the consent of the States and the

municipalities through which they pass, before they are entitled to so use the post-roads of the United States, is to admit the power of an authority other than the United States to control them, and indirectly at least to concede to such other authority the right to regulate interstate commerce. The object sought to be attained, the benefits intended to be secured to the Government of the United States, through the regulation of the business mentioned, and the facilities for communication between its departments in distant sections of the nation, would be jeopardized if not destroyed by the antagonistic interests likely to be found in different localities, if the officials thereof possessed the power to determine when and how the right granted by the Federal Government should become operative. Such companies, under the legislation of the Congress have the right to use the post-roads of the United States in conducting their business, but such use is subject to the police power of the localities where they so operate, which properly exercised by state and municipal authority, must be respected by complainant, and by all companies similarly situated. The rules and regulations promulgated by such authority must be reasonable, should be free from local prejudice or favoritism, and enacted in an honest endeavor to best subserve existing rights and conditions. It is the duty of the local authorities to see that the safety and the interests of the communities where such companies are located are protected, and that for the use of the property of the public such compensation is paid as will at least keep in good repair the streets, alleys and post-roads, that are intended for the enjoyment of all alike. As a matter of course all such companies are subject to taxation on their property, in the same manner and to the same extent, as are the other companies and citizens generally of the sections where the property is situated. They must contribute their due proportion to the expenses of the local governments, the benefits of which they enjoy, and whose protection they are entitled to.

It follows that the only questions I have now to dispose of, relate to the reasonableness of the provisions of said Chapter 88, of the Code of the City of Richmond. The complainant maintains that each and every section of that Chapter is unreasonable, burdensome and unconstitutional, while the defendant insists that they are legal and reasonable, being a proper exercise of the police power of the City.

302 The requirements of section one, that the poles used by complainant shall be subject to the determination of the City Engineer, as to size, number, location and manner of erection, does not deprive complainant of the right given it by the Act of Congress of July 24, 1866, as all companies accepting the terms of that legislation do so, subject to the right of the States and municipalities therein, to regulate by reasonable rules, the manner in and by which the highways of the State, and the streets of the Cities shall be so used. It will not do to hold that the companies shall themselves exclusively decide such matters, nor will the cities be permitted to dispose of them in such way, as to render the rights

granted by Congress inoperative. If the conditions imposed are unreasonable, and are intended to unnecessarily restrict, or to absolutely prevent such use of the post-roads of the country, such regulations will be decreed to be inoperative and void. I see no objection to the designation of the City Engineer as the party to decide such matters, and presumably his action will be fair and just to all the interests involved. When he acts unjustly, then his conduct can be complained of and reviewed.

So far as section two is concerned, complainant's fears are not well grounded, for the City cannot compel it to cease its use of the streets and alleys, and the desire of the defendant to compel complainant to submit to the jurisdiction of its Council, is not reprehensible, especially as it does not appear that such effort is accompanied by the intended enforcement of unjust and arbitrary rules and conditions.

The contention that section four is unreasonable, is I think without merit, for unless the City reserves the right to regulate the use of the poles, giving to the company erecting them all that its necessities require, and then permitting others to use them for purposes that will not interfere with their use by the owner, the streets will be actually encumbered with the great number of poles that the many interests using them may erect. The public convenience is to be considered by the City, as well as the rights of the complainant, and if by requiring the latter to permit others to use its poles, under proper restrictions and for a just consideration, the further occupancy of the streets with its accompanying defacement and impairment is obviated, surely much has been accomplished and no appreciable harm inflicted. While there is nothing in this record tending to show that complainant has so acted, still it is not improbable that some telegraph company may not for purposes of its own, erect poles intended to retard the business of others, and it is quite apparent that a regulation permitting those others to use such poles, would have a tendency to check their erection. When the Committee on Streets of the City of Richmond, abuses the power given it by this section, complainant I doubt not will find a way to be duly heard.

Section five, which commits to the City Engineer the duty of determining the number, size and location of telegraph poles, has in substance been referred to, and is not improper. Section six in reserving to the Board of Fire Commissioners the right to run such wires as are needed for the fire alarm, and the police telegraph departments of the City of Richmond, on the poles erected or allowed under the ordinance mentioned, is a wise provision, beneficial to the public, not burdensome to the complainant, and makes unnecessary the erection of additional poles on crowded streets for those purposes. Section seven, is not specifically complained of, and though included in the general condemnation of the ordinance is free from fault; as is also section eight, which so far as now appears is a proper exercise of the police power of the City. If hereafter, in the exercise of the power reserved in this section, action unreasonable in character should be taken by the

City, then will be the time for complainant to show it and secure relief therefrom.

The allegations of the bill pertaining to sections nine, ten, eleven, twelve and thirteen of the ordinance, that their provisions violate the terms of the Act of Congress mentioned, in imposing a charge of two dollars per pole per year, and providing a penalty for its non-payment, and for failure to remove the poles on which complainant has not paid said sums, cannot be sustained. The statute is not susceptible of the construction claimed for it by complainant, and the evidence does not show that the charge made is under the circumstances unreasonable.

I see no objection to sections fifteen and sixteen, and I am quite sure that they are not liable to the criticism made by complainant. The inspection provided for is necessary, and the City would fail in its duty to the public, should it neglect to provide for and require it. The fear that something unreasonable may in the future, be imposed by virtue of these sections is unwarranted and chimerical, and all such troubles can be met and disposed of when they present themselves.

Sections seventeen to twenty-six relate to the wires, the method of erecting them, their insulation, how they can be distinguished, what companies own them, and imposes penalties for failure to comply with their provisions. They are eminently proper, apply to all alike, are not unreasonable and indicate a desire on the part of the City, to protect the interests of all whose welfare is confided to its care.

305 Sections twenty-seven and twenty-eight, as originally enacted and as amended, are alleged by complainant to be specially burdensome, illegal, unconstitutional and unreasonably restrictive of its rights, grants and privileges. They determine and describe the limits of the "underground district," and require all poles and wires in use therein to be removed therefrom, except trolley wires. They authorize any company to place its wires in conduits under the surface of the streets of the City, after application has been duly made by it for that purpose, in which the streets to be so used are to be named, and a map locating the conduits, with plans and details concerning them is to be filed therewith. The permission to use the streets is then to be granted by the City Council, under the conditions and regulations heretofore referred to. I think the complainant is shown by the record, to be unreasonably apprehensive of the result that will follow the enforcement of these sections. Their provisions apply to all alike, are not peculiar to the City of Richmond, but are found in the enactments of most of the cities of the United States. At one time not necessary they are now absolutely essential, and not only is the convenience and safety of the public subserved by them, but also do they protect the interests and facilitate the business of the complainant. It is to be regretted that their enforcement will cause trouble and expense to the complainant, as it will also to the defendant, but that is no reason why they should not be respected, nor does that make them unreasonably burdensome. In fact the evidence taken and the case as submitted, discloses no effort on the part

of the defendant to discriminate against the complainant, to impose upon it unnecessary restrictions, to regulate it by unreasonable provisions, or to cause it to pay excessive charges for its privileges.

306 The City Council has acted within the limit of its police power, and the sections now under consideration, instead of being so unreasonable as to demonstrate an abuse of discretion, show rather a disposition to provide for and protect all alike, even if they do place burdens on those who enjoy the privileges they refer to and regulate. The "underground section" is the populous and congested section of the city, where the poles and wires are an ever continuing danger to life and property, and the defendant in requiring their removal has acted wisely, and in directing that the wires be placed in conduits, has well and reasonably provided for a difficult problem, one that it was its duty to consider and dispose of. Complainant erected its poles and wires with the implied understanding that if the public necessity required it, they should be changed or so regulated as to make their use of the streets as slight an inconvenience to the City as possible. If complainant now places its wires in conduits,—as it must do, unless it abandons the use of said streets,—it will be with the understanding that if in the future, the changes wrought by time may for the public weal demand their improvement or reconstruction, that it will submit thereto. The provision in section twenty-eight that such conduits may be required to be changed or removed when the necessities of the public require it, is simply the declaration of what the law now is, and does not impose an unnecessary burden, nor does it provide for taking property without due process of law. Our property rights must yield, sometimes without compensation, to the police power of the State when exerted in the interest of the health and safety of the public.

The courts will not undertake to make reasonable regulations under which the business of complainant may be conducted in the City of Richmond, but will in a proper case, when that City has duly
307 enacted such rules, determine whether or not they are reasonable; this court will not presume that the ordinance of the City yet to be enacted, as provided for in section thirty-one, will be unfair and illegal, but does presume that should it prove to be so, the court to which complainant may then apply will so hold, and will take jurisdiction of the matter, regardless of the fact that the City may not have so provided, as this court in this case took such jurisdiction.

The City by the enactment of section thirty-four of the ordinance complained of, declared that none of its "obligations, burdens and restrictions" should in any manner interfere with or destroy the rights and privileges secured to telegraph companies which have accepted the provisions of the Act of Congress of July 24th, 1886. This section can neither add to nor detract from the complainant's rights under that legislation, but it may properly be considered in connection with said ordinance, when the motive of the Council enacting it is sought for.

That complainant was not given permission by the Congress, to occupy the streets of the City of Richmond, without paying its fair

proportion of the taxes required to maintain the government of that City, and without being required to submit to all reasonable regulations provided for by its Council, has been so often announced by the courts, as to justify the suggestion that questions relating to such matters, might well be considered as disposed of. However, in deference to the earnest insistence of able and experienced counsel, I refer to a few of the decisions of the Supreme Court of the United States. In *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 100, that court said: "It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights."

In *Atlantic Tel. & Co., v. Philadelphia*, 190 U. S. 160, it is said: "No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor. * * * In other words, if a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision."

In *Richmond v. Southern Bell Telephone and Telegraph Co.*, 174 U. S. 761, the Supreme Court speaking through Justice Harlan said: "The Circuit Court of Appeals, while holding that the plaintiff was entitled to avail itself of the provisions of the Act of 1866,—a question to be presently considered,—adjudged that the rights and privileges granted by that act were to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the State or to one of its municipalities. This was in accordance with what this court had adjudged to be the scope and effect of the act of 1866."

In *Western Union Telegraph Co., v. Massachusetts*, 125 U. S. 530, 548, I find the following: "While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of its laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

While it is true that the City cannot impose a tax upon the franchise of the Company, as that would be a burden upon interstate commerce, still it can make a reasonable charge for the use of its

property, in which all the public are interested, and if the complainant occupies any of such property there is no reason why it should not pay a reasonable rent for it, as all citizens and all other corporations do for a like use. It is not a tax, in the sense in which that word is ordinarily used, but is in the nature of a special toll imposed for a specific use of designated property, by a particular party. The poles deprive the City and the public of the use of certain portions of the streets, and frequently necessitate the excavation, repair and inspection of the same, causing expense to the City and inconvenience to the public. A toll of two dollars per pole per annum, might be an unreasonable charge along a country highway, but in a thickly settled section like the streets of the City of Richmond, where many people for various purposes make continuous uses of them—the sum of two dollars per year for such use per pole seems entirely proper and reasonable. It may not be improper in this connection

310 to notice, that I find from the record, that complainant, uncomplainingly paid this charge for over twenty years preceding the institution of this suit, and it seems to me that such acquiescence should, unless other reasons than those assigned exist, estop it from complaining now, so far at least as such charge is concerned.

My conclusion is that complainant has not been deprived of any of the rights to which it is entitled under the laws and Constitution of the United States, and that no unreasonable rules and regulations have been provided by the ordinance complained of or by any of its sections, for conducting the business of complainant in the City of Richmond.

The injunction asked for is denied, the restraining order heretofore granted will be dissolved, and the bill will be dismissed.

NATHAN GOFF,

U. S. Circuit Judge.

Dec. 9th, 1909.

Order Dissolving Preliminary Injunction and Dismissing Complainant's Original and Amended Bills.

Entered and Filed December 18th, 1909.

In the Circuit Court of the United States for the Eastern District of Virginia.

In Equity.

WESTERN UNION TELEGRAPH COMPANY, a Corporation, Complainant,
versus

CITY OF RICHMOND, a Municipal Corporation, Defendant.

This cause came on this day to be heard having been argued by counsel on December 8, 1908, and the Court not then being advised of its judgment to be rendered in the premises took time to consider thereof, and now this cause coming on to be further heard,

On consideration whereof, the court doth hereby overrule
311 each and all of the objections and exceptions set forth in the
record taken by the complainant, to the testimony and evidence of the witnesses Frank T. Bates, H. M. Smith, Jr., W. H. Thompson, Benj. T. August, C. V. Meredith, Carlton McCarthy, Robert Lecky, Jr., George C. Shaw, John H. Frischkorn, John H. Redwood and doth admit and consider said testimony and evidence, together with the other testimony and evidence, the special attention of the court not having been called to said exceptions in the oral or printed argument of counsel, and for reasons stated in writing and filed with the record on December 9, 1909, doth refuse to grant the injunction prayed for in the original and amended bills, and doth vacate and dissolve the temporary restraining order entered by the Honorable Edmund Waddill, Jr., United States Judge, on the 21st day of June, 1904, and doth adjudge, order and decree that the said original and amended bills be dismissed and that the Western Union Telegraph Company pay to the City of Richmond its costs by it expended about its defense, the same to be ascertained and taxed by the Clerk of this Court.

NATHAN GOFF,
U. S. Circuit Judge.

Richmond, Virginia, December 18th, 1909.

Petition for Appeal and Supersedeas.

Filed January 5th, 1910.

In the Circuit Court of the United States for the Eastern District of Virginia.

312 In Equity.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.

THE CITY OF RICHMOND, Defendant.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Virginia:

Your petitioner, The Western Union Telegraph Company, respectfully represents as follows:

First. Your petitioner, The Western Union Telegraph Company, a corporation chartered, organized and existing under the laws of the State of New York, and a citizen and resident of the State of New York, is the sole plaintiff in this suit, and the City of Richmond, a municipal corporation chartered and existing under the laws of the State of Virginia, and a citizen and resident of the State of Virginia, is the sole defendant in this suit.

Second. (a) Your petitioner, The Western Union Telegraph Company, filed its original bill in equity in this cause, together with the exhibits accompanying the same, in the Circuit Court of the United States for the Eastern District of Virginia on June 21, 1904,

and on that day said court, upon the application of your petitioner, entered a temporary restraining order, providing as follows:

Copy of Injunction Order.

"This day came the complainant and filed its bill duly verified and thereupon it is ordered:

"That the defendant, the city of Richmond, show cause before this court, at its court room in the city of Richmond on the 313 26th day of July, 1904, at the hour of twelve o'clock, why an injunction should not be granted, enjoining and restraining the city of Richmond, its attorneys, agents and servants and all others acting by, through or under its authority, from enforcing or attempting to enforce against the complainant the provisions and requirements of Chapter 88 of Richmond City Code, 1899, and the provisions and requirements of any or either of the various sections of said Chapter 88, and the provisions of the amendments to Sections 27 and 28 of said Chapter 88, and the provisions of any amendment to said Chapter 88, and from enforcing or attempting to enforce the penal features of said Chapter 88 and the amendments thereto and the fines and penalties, or any or either of them, imposed by said Chapter 88 and the amendments thereto, and from removing or attempting to remove from the streets and alleys of the defendant the poles, wires, cables and other appliances of complainant, or any or either of them, and from in any manner or to any extent interfering with the complainant or its property, and from in any manner, or to any extent obstructing the business of complainant.

"And there appearing to be danger of irreparable injury and delay, it is ordered that in the meantime and until the further order of this Court, the said City of Richmond, its attorneys, agents and servants, and all others acting by, through or under its authority, be, and they are, hereby temporarily enjoined and restrained from enforcing, or attempting to enforce, the fines and penalties, or any or either of them, imposed by said Chapter 88, and the amendments thereto, and from removing, or attempting to remove, from the streets and alleys of the City of Richmond, the poles, wires, 314 cables and other appliances of the complainant mentioned in the bill.

"But, the defendant may, prior to July 26, 1904, move to vacate this temporary restraining order after having first given the plaintiff five days' notice of its purpose so to do.

"The plaintiff, or some one for it, is required within two days from the date of this order, to execute before the clerk or his deputy of this court, at Richmond, Virginia, a bond with security to be approved by a judge of this court, in the penalty of \$5,000.00, conditioned to pay all damages and costs which may be adjudged against the plaintiff, in case the above restraining order shall be dissolved.

(Signed)

EDMUND WADDILL, JR.,
United States Judge.

Norfolk, Va., June 21, 1904."

A copy.

And the bond required by said restraining order was duly executed before the clerk of said court with security approved by a Judge of said court within two days from June 21, 1904, and said restraining order became immediately operative as an injunction.

(b) On March 18, 1905, your petitioner filed its amended bill of complaint in this cause, together with the exhibits accompanying the same, in the Circuit Court of the United States for the Eastern District of Virginia.

Both of said bills were duly matured against the defendant, and your petitioner, without attempting to go into details, refers to the record for the purpose of showing said bills and all other pleadings and all orders, proceedings, stipulations, depositions, exhibits and decrees in this cause.

Third. The aforesaid restraining order, dated June 21, 1904, having remained in full force and effect as an injunction order until the 18th day of December, 1909, the said court on that day made and signed a final order by which it refused to grant the injunction prayed for in the original and amended bills and dismissed your petitioner's original bill and its amended bill with costs.

Fourth. Your petitioner respectfully submits that the Circuit Court erred in making and entering its said decree of December 18th, 1909, by which (a) it refused to grant the injunction prayed for in said original and amended bills, dissolved the aforesaid restraining order, dated June 21, 1904, operating as an injunction, and (b) dismissed your petitioner's original bill and your petitioner's amended bill with costs.

Fifth. Your petitioner conceiving itself aggrieved by the said decree of said Circuit Court, made and entered on December 18th, 1909, hereby appeals from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and prays that this appeal may be allowed and that a supersedeas may be awarded to operate as a continuance in full force of the aforesaid temporary restraining order or injunction order, dated June 21, 1904, during the pendency of this appeal: that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States and that said decree, bearing date December 18th, 1909, may be reviewed and reversed by the Supreme Court of the United States and that your petitioner may be given such further relief as may be proper in matters of this character.

THE WESTERN UNION TELEGRAPH
COMPANY,
RUSH TAGGART,
ADDISON L. HOLLADAY,
Solicitors.

316

Assignment of Errors.

Filed January 5th, 1910.

In the Circuit Court of the United States for the Eastern District of Virginia.

In Equity.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,

vs.

THE CITY OF RICHMOND, Defendant.

The Western Union Telegraph Company respectfully says that the decree made and entered in this cause on the — day of December, 1909, dissolving the temporary restraining order, operating as an injunction, dated June 21st, 1904, and dismissing the original bill and amended and supplemental bill of the Western Union Telegraph Company is erroneous, and hereby assigns as error in the making and entry of said decree the following, to-wit:

First. That the court erred in dismissing said bill, whereas the court should have granted to the complainant therein the relief asked for by it.

Second. That said decree is erroneous in that it adjudged Chapter eighty-eight (88) of the Ordinances of said City of Richmond to be valid and constitutional, and erred in failing to hold that each of the several sections specified in the bill is unreasonable and repugnant to the Acts of Congress and the constitutional provisions enumerated and set forth in said bill.

317 Third. That said decree is erroneous in that it holds that section one (1) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Fourth. That said decree is erroneous in that it holds that section two (2) of said chapter 88 of the Ordinances of the said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Fifth. That said decree is erroneous in that it holds that section four (4) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Sixth. That said decree is erroneous in that it holds that section five (5) of said chapter 88 of the Ordinances of the said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Seventh. That said decree is erroneous in that it holds that sec-

tion six (6) of said Chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Eighth. That said decree is erroneous in that it holds that section seven (7) of said Chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Ninth. That said decree is erroneous in that it holds that section eight (8) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Tenth. That said decree is erroneous in that it holds that section nine (9) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Eleventh. That said decree is erroneous in that it holds that section ten (10) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Twelfth. That said decree is erroneous in that it holds that section eleven (11) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Thirteenth. That said decree is erroneous in that it holds that section twelve (12) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Fourteenth. That said decree is erroneous in that it holds that section thirteen (13) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the

Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Fifteenth. That said decree is erroneous in that it holds that section fifteen (15) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Sixteenth. That said decree is erroneous in that it holds that section sixteen (16) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Seventeenth. That said decree is erroneous in that it holds that section twenty-five (25) of said chapter 88 of the Ordinances of said City

of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Eighteenth. That said decree is erroneous in that it holds that section twenty-six (26) of said Chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Nineteenth. That said decree is erroneous in that it holds that section twenty-seven (27) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Twentieth. That said decree is erroneous in that it holds
320 that section twenty-eight (28) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Twenty-first. That said decree is erroneous in that it holds that section thirty-one (31) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Twenty-second. That said decree is erroneous in that it holds that section thirty-two (32) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Twenty-third. That said decree is erroneous in that it holds that section thirty-three (33) of said chapter 88 of the Ordinances of said City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 24th, 1866, and the constitutional provisions set forth in the bill.

Twenty-fourth. There is error in said decree in that it did not award to the complainant an injunction against the enforcement of the ordinance, and of the several provisions thereof, and each of them, heretofore enumerated as unreasonable and unjust.

Wherefore, complainant asks that the said decree may be reversed and it restored to all things which it has lost by reason thereof.

**THE WESTERN UNION TELEGRAPH
COMPANY,**

By **RUSH TAGGART,**
ADDISON L. HOLLADAY,
Solicitors.

321

Order Allowing Appeal.

Filed January 5th, 1910.

In the Circuit Court of the United States for the Eastern District of
Virginia.

In Equity.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.

THE CITY OF RICHMOND, Defendant.

This day The Western Union Telegraph Company presented its petition for the allowance of an appeal in the above entitled action to the Supreme Court of the United States, which prayer for an appeal is hereby allowed, conditional upon said Western Union Telegraph Company giving an appeal bond in the sum of one thousand dollars (\$1,000.), the same to be approved by a Judge of this Court.

The supersedeas asked for is refused.

NATHAN GOFF,
U. S. Circuit Judge.

Jan. 5th, 1910.

322

Appeal Bond.

Approved and Filed January 5th, 1910.

Know all men by these presents, That we John P. Stith, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto the City of Richmond in the sum of One Thousand Dollars (\$1,000.00), in lawful money of the United States, to be paid to the said City of Richmond, for which payment, well and truly to be made, the said John P. Stith binds himself, his heirs, executors and administrators, and the said American Surety Company of New York binds itself, its successors and assigns, firmly by these presents.

Sealed with our seals and dated this first day of January, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of the United States for the Eastern District of Virginia in a suit depending in said Court, between The Western Union Telegraph Company, a corporation, complainant, and the City of Richmond, a municipal corporation, defendant, a decree was rendered against the said The Western Union Telegraph Company, the complainant, and the said The Western Union Telegraph Company, the complainant, having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said City of Richmond, a municipal corporation, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the day in the said citation mentioned:—

Now, the condition of the above obligation is such, That if the said The Western Union Telegraph Company, a corporation, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN P. STITH. [SEAL.]
AMERICAN SURETY COMPANY OF
NEW YORK,

[SEAL OF SURETY COMPANY.]

By GEO. N. SKIPWITH, *Agent*.

Sealed and delivered in the presence of,
JOSEPH P. BRADY,
Clerk United States Circuit Court.

Approved by,
NATHAN GOFF,
U. S. Circuit Judge.

January 5th, 1910.

324 *Citation.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States to City of Richmond, a municipal corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington on the thirty-first day of January, 1910, pursuant to an appeal from a decree of the Circuit Court of the United States for the Eastern District of Virginia in your favor passed in a cause in said Court wherein The Western Union Telegraph Company, a corporation, is complainant and you are defendant to show cause, if any there be, why the decree rendered against the said complainant in said cause mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Nathan Goff, Judge of the Circuit Court of the United States for the Eastern District of Virginia, this 5th day of January, in the year of our Lord, one thousand nine hundred and ten.

NATHAN GOFF,
U. S. Circuit Judge.

Acknowledgement of Service.

Service of the above citation is acknowledged by the City of Richmond this 24th day of January, 1910.

H. R. POLLARD,
Solicitor for the City of Richmond.

325 *Stipulation of Counsel as to Original Photographs.*

Filed January 22nd, 1910.

In the Circuit Court of the United States for the Eastern District of
Virginia.

In Equity.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
vs.
CITY OF RICHMOND, Defendant.

It is stipulated between the plaintiff and the defendant that the plaintiff, with the consent of the defendant, shall apply to the presiding Judge of the above entitled Court for an order directing the transmission, safe keeping and return of the original photographs filed by the defendant in this cause to be received and considered by the Supreme Court of the United States in connection with the transcript of the record in this cause, said photographs to be used and treated and have the same effect and no other as if copies and reproductions thereof had been duly made, certified and filed as a part of the record in this cause.

H. R. POLLARD,
Solicitor for Def't.
ADDISON L. HOLLADAY,
*As Solicitor for the Plaintiff.*326 *Order Directing Clerk to Transmit Original Photographs.*

Entered and Filed January 22nd, 1910.

In the Circuit Court of the United States for the Eastern District
of Virginia.

In Equity.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
vs.
CITY OF RICHMOND, Defendant.

By consent of both the plaintiff and the defendant, by counsel, and it being proper in the opinion of the presiding Judge of the Circuit Court of this Circuit that the original photographs, filed as Exhibit Lecky No. 1 and Exhibits Thompson Nos. 2 to 15, inclusive, should be inspected by the Supreme Court of the United States upon appeal, it is ordered that the Clerk of this Court do transmit by express to the Clerk of the Supreme Court of the United States at Washington, District of Columbia, at the same time and in the same package that

the record in this case is transmitted to said Clerk, the original photographs, marked Exhibit Lecky No. 1 and Exhibits Thompson Nos. 2 to 15, inclusive, to be preserved by said Clerk of the Supreme Court of the United States at Washington in his files with the record in this cause until the hearing and determination of this cause by said Supreme Court of the United States, and then to be returned by said Clerk of said Supreme Court to the Clerk of this Court by express, who shall file them with the original papers in this cause in his office.

NATHAN GOFF.

January 22nd, 1910.

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Stipulation of Counsel as to Record.

Filed January 22nd, 1910.

In the Circuit Court of the United States for the Eastern District of Virginia.

In Equity.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
vs.

CITY OF RICHMOND, Defendant.

It is stipulated between the plaintiff and the defendant that the Clerk of the Circuit Court shall certify and transmit to the Supreme Court of the United States as the record in the above entitled cause, the following:

1. The record as heretofore printed for the convenience of the Circuit Court in this cause.
2. The opinion of the Circuit Court, dated and filed on the 9th day of December, 1909.
3. The final decree of the Circuit Court, dated December 18, 1909.
4. The papers and proceedings for the taking and removal of this cause to the Supreme Court of the United States on appeal, including the petition for appeal, assignment of errors, bond with the approval of the court thereon, citation, the order allowing the appeal, etc.

H. R. POLLARD,

Solicitor for Defendant.

ADDISON L. HOLLADAY,

As Solicitor for the Plaintiff.

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Clerk's Certificate.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, Clerk of the Circuit Court of the United States for the Eastern District of Virginia, do hereby certify the

foregoing to be a full, true and correct transcript of the record the therein entitled cause, as required by stipulation of court filed therein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at the City of Richmond, Virginia, this twenty-fifth day of January, A. D., 1910.

[Seal United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
*Clerk of the Circuit Court of the United States
for the Eastern District of Virginia*

329 UNITED STATES OF AMERICA, ss:

The President of the United States to City of Richmond, a municipal corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington on the thirty-first day of January, 1910, pursuant to an appeal from the decree of the Circuit Court of the United States for the Eastern District of Virginia in your favor passed in a cause in said Court wherein The Western Union Telegraph Company, a corporation, complainant and you are defendant to show cause, if any there why the decree rendered against the said complainant in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Nathan Goff, Judge of the Circuit Court of the United States for the Eastern District of Virginia, this 25th day of January, in the year of our Lord, one thousand nine hundred and ten.

NATHAN GOFF,
U. S. Circuit Judge

Service of the above citation is acknowledged by the City of Richmond this 24th day of January 1910.

H. R. POLLARD,
Solicitor for the City of Richmond

Endorsed on cover: File No. 21,988. E. Virginia C. C. U. Term No. 419. The Western Union Telegraph Company, appellant vs. The City of Richmond. Filed January 29th, 1910. File No. 21,988.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 100.

THE WESTERN UNION TELEGRAPH COMPANY

Appellant

vs.

THE CITY OF RICHMOND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA.

BRIEF ON BEHALF OF THE WESTERN UNION
TELEGRAPH COMPANY, APPELLANT

RUSH TAGGART,

A. E. HOLLADAY,

Attorneys for Appellant

Supreme Court of the United States,

OCTOBER TERM, 1911.

THE WESTERN UNION TELEGRAPH
COMPANY,

Appellant,

VS.

THE CITY OF RICHMOND.

No. 195.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

BRIEF ON BEHALF OF THE WESTERN UNION TELEGRAPH COMPANY, AP- PELLANT.

Statement.

This case comes into this court on appeal from the decree of the Circuit Court of the United States for the Eastern District of Virginia, made and entered therein on the 18th day of December, 1909, dissolving the temporary restraining order obtained in the case and operating as an injunction, dated June 21, 1904, and dismissing the original bill and the amended and supplemental bill of The Western Union Telegraph Company filed in said court. The original bill of complaint was filed in the Circuit Court in June, 1904, to restrain the enforcement by the defendant, the City of Richmond, of an ordinance of that city enacted September 10, 1895, and amendments thereto, approved March 15, 1902, and December 18, 1903, and codified as Chapter 88 of the Ordinances of the City.

In order to understand the history of the ordinance, it is necessary to go back to the year 1884. In that year the

Southern Bell Telephone & Telegraph Company applied to the City of Richmond for authority to erect poles and a line of wires along and upon the streets of the city of Richmond. By an ordinance passed June 26, 1884, this permission was granted as to certain specified streets and routes and the Southern Bell Telephone & Telegraph Company accepted the provisions of such ordinance and built its lines under and in accordance therewith.

Subsequently, on the 13th day of February, 1889, the Southern Bell Telephone & Telegraph Company accepted the provisions, restrictions and obligations of the Act of Congress, approved July 24th, 1866, entitled "An Act to aid in the Construction of Telegraph Lines and to secure to the Government the use of the same for Postal, Military and other Purposes."

On December 14, 1894, the City Council of Richmond repealed the ordinance of June 26, 1884, granting these privileges to the Southern Bell Telephone Company, the repeal to take effect twelve months after its approval. On September 10th, 1895, the City Council passed an ordinance as to the joint use of poles erected in the streets and alleys of the city of Richmond for the support of wires used in connection with the transmission of electricity. On the 10th day of September, 1895, another ordinance was passed requiring the removal of poles and wires from certain sections of the city and for the construction and use of ducts in certain streets within that defined section. Both of these ordinances were to be enforced under very heavy penalties and contain what are claimed to be unreasonable provisions. These ordinances, consolidated as chapter 88 of the City ordinances, with some immaterial changes, constitute the ordinance which is involved in the controversy between the Western Union Telegraph Company and the City of Richmond in this case. Efforts having been made to carry them into effect the Southern Bell Telephone and Telegraph filed its bill in the United States Circuit Court for the Eastern District of Virginia praying an injunction. It rested its right to an injunction upon its rights under the Act of Congress of 1866. An interlocutory injunction was granted in the case. See 78 Fed., 858.

The injunction having been granted the city appealed and upon appeal the United States Circuit Court of Appeals sustained the injunction with certain modifications (96 Fed. 19).

In passing upon the rights of the Southern Bell Telephone and Telegraph Company, it held that the complainant was entitled to all the privileges and benefits of the Act of July 24, 1866, and that the ordinance in question was an unreasonable exercise by the city of Richmond of its police powers.

In the course of the opinion Judge SIMONTON said :

“ These conditions, regulations and restrictions already prescribed by the city council, appear to be stimulated by a desire to oppress and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power.”

The city of Richmond appealed to this Court where the case turned upon the question of the right of the complainant the Southern Bell Telephone and Telegraph Company to claim the benefits and privileges of the Act of Congress approved July 24, 1866. This court held contrary to the views of the Circuit Court and the Circuit Court of Appeals upon this question and held that the Southern Bell Telephone and Telegraph Company was not a “ telegraph ” company within the meaning of the provisions of that Act and therefore not entitled to the benefit of its privileges, and reversed the case, not considering the determination of the Circuit Court of Appeals respecting the character of the ordinance.

Thereafter that case came before Circuit Judge Goff, and he held that the Southern Bell Telephone and Telegraph Company was bound by the provisions of the ordinance of June 26, 1884, and of the repealing ordinance, having agreed with the city with respect thereto, and that the repeal, therefore, was simply the exercise of a right which the City of Richmond had reserved in the contract (98 Fed. Rep., 671). On appeal this position was affirmed, the Circuit Court of Appeals, speaking through SIMONTON, J., holding that the relations of the Southern Bell Telephone and Telegraph Company and the City of Richmond were contractual, and that the Federal court did not have the right to determine the reasonableness or unreasonableness of the ordinance of the city (103 Fed., 38).

No attempt was made to enforce the provisions of these ordinances against the Western Union Telegraph Company, complainant herein, until after the litigation of the city of Rich-

mond with the Southern Bell Telephone and Telegraph Company had terminated as above indicated.

Shortly after the termination of that litigation threats were made of enforcing the provisions of the ordinances, particularly the sections relating to the placing of wires underground, against the Western Union Telegraph Company. In view of the severe penalties attaching to the underground ordinance the Western Union Telegraph Company sought to have the same amended and offered to place its wires underground under any reasonable ordinance, which offer having been refused, and the city having threatened to impose the severe penalties of the ordinance, the Western Union Telegraph Company, in 1904, was compelled to go into the courts and file its bill seeking the protection of the Federal courts against what it claimed to be the wholly unreasonable exercise of the power of the city in attempting to regulate the use of the streets.

The case as made by the amended bill, upon which the case was tried, is that the Western Union Telegraph Company is a corporation of the State of New York owning lines of telegraph extending to all the states and territories of the United States and connecting with cable lines to foreign countries, and which company had, in 1867, accepted the provisions of the Act of Congress of July 24, 1866, Sections 5263-5268 inclusive, Title 65 of the Revised Statutes of the United States. That among its lines are lines constructed along the streets of Richmond, all of which, by the Acts of Congress, are declared and held to be post routes; that the telegraph company has the right, under the Act of Congress, to construct, maintain and operate its lines of telegraph along the streets within the city of Richmond in such a manner as not to interfere with the ordinary travel thereon, and subject only to such lawful regulations and restrictions as the city may impose in the lawful and proper exercise of its police power. The bill concedes to the fullest extent the right of the city to enact ordinances in the exercise of its police power and regulate the use of the streets, and includes within the things which the city may lawfully do, the right, under proper restrictions and conditions, to require, in the congested portions of the city, the removal of the wires from overhead and placing them underground.

The question which the telegraph company makes in this case, is as to the right of the city to impose such conditions as those in the ordinance in question. The sole question, is as to whether in the passage of this ordinance the city has restricted itself to the legitimate exercise of the police power, or has exceeded the proper limits for such action.

The bill sets forth the various sections of the ordinance and the particulars in which it is claimed that the ordinance exceeds the power of the city to impose regulations upon the telegraph company operating its lines through the streets as an agency of the Federal government under the powers granted by the Act of Congress.

The answer to the amended bill sets up certain ordinances granting rights to some of the streets of the city of Richmond to the American Union Telegraph Company in 1880, to whose rights the Western Union Telegraph Company has succeeded by consolidation, and claims that by virtue of that fact the Western Union has lost its rights under the Act of Congress obtained by its acceptance of the provisions of that Act in 1867. The remainder of the answer is chiefly concerned with a denial of the effect and force of the ordinance in question, and is therefor the setting up of questions which are really questions of law.

Some testimony was taken, which will be alluded to in the course of the argument, but mainly this court will be concerned with the question of the meaning, force and effect of the ordinance and will not have much occasion to deal with the effect of the testimony for the reason that the question of the effect of the ordinance can be determined by an inspection and examination of the text.

It should be clearly understood that the Western Union Telegraph Company, in filing its bill and in prosecuting the suit, recognizes to the fullest extent the right of the city of Richmond and the state of Virginia to subject its property within the state or city to the power of taxation legitimately applied, and also to the right of regulation so far as necessary to secure the comfort and convenience of the people of the city, and it is because, in its view, these legitimate limits have been transcended in the passage of the ordinance in question

that it resists the enforcement of the ordinance and asks this court to intervene and protect it by injunction.

The grounds upon which it thus appeals to the court and wherein it deems its rights are infringed are :

- FIRST.** The ordinance does not impose definite rules for the guidance of the telegraph company in the operation of its business within the city, but exposes the operations of the company to the arbitrary discretion of the officers of the city without any definite rules to guide the officers in the discharge of their duties.
- SECOND.** The ordinance imposes excessive fines and penalties for the failure to obey the arbitrary orders of the city officials in matters concerning which the company has no guide except the direction of these officers.
- THIRD.** The ordinance requires the company to furnish to the city large and extensive facilities for the doing of the city's business without compensation or reward therefor, and such compulsion is not a legitimate exercise of the police power.
- FOURTH.** The ordinance respecting underground wires requires the company to construct property which may be available for others to use, and which it is not permitted to use without the consent of the city, and which may never be used.
- FIFTH.** The ordinance imposes illegal conditions, restrictions, expenses and burdens as conditions of the right to use the streets of the city of Richmond, which right is secured to the telegraph company by an Act of Congress, subject only to the compliance with reasonable police regulations for the protection and convenience of the inhabitants of the city.
- SIXTH.** The ordinance seeks to put limits upon the right of the telegraph company to use the streets, and to require the abandonment of the use of the streets at the demand of the city, while the Act of Congress secures to the telegraph company the full and unlimited right to use the streets subject only to fair and reasonable regulations by the city.

ARGUMENT.

FIRST.

The ordinance does not impose definite rules for the guidance of the Telegraph Company in the operations of its business within the city, but exposes the operations of the company to the arbitrary discretion of the officers of the city without any definite rules to guide the officers in the discharge of their duties.

The telegraph company has the right, under the Act of Congress, to use every street within the city of Richmond. It is not, therefore, required to contract with the city for such right to use the street, nor is it required to be a suppliant to the city nor to comply with every condition which the city may see fit to impose. It must pay taxes upon its property within the city the same as other persons or corporations owning property there (*W. U. Tel. Co. vs. Massachusetts*, 125 U. S., 530). It may be required to pay reasonable compensation for the property occupied by its poles or appliances (*W. U. Tel. Co. vs. St. Louis*, 148 U. S., 92). It is subject to such necessary provisions respecting its buildings, poles and wires which the comfort and convenience of the community may require (*W. U. Tel. Co. vs. Pendleton*, 122 U. S., 359). It is not, however, exposed to the arbitrary discretion of any officer of the city with respect to the operations of its lines. Neither the city nor the state can prevent it from operating within their limits by any form of legislation whatever (*Pensacola Tel. Co. vs. W. U. Tel. Co.*, 96 U. S., 1).

The city may not, with respect to any individual or corporation, subject it to the arbitrary discretion of an officer acting without any definite rule laid down for his guidance. This is clearly held in the case of *Mayor of Baltimore vs. Radecke*, 49 Md., 217; also in *Anderson vs. City of Wellington*, 40 Kas., 173, and in *State ex rel. Garrabad vs. Dering*, 84 Wis., 585, 54, N. W., 1108; *Town of State Center vs. Barenstein*, 66 Iowa,

249; *Inhabitants of Winthrop vs. New England Chocolate Company*, 180 Mass., 464.

Let us turn now to the ordinance and examine its provisions to see in what particulars it violates the rules laid down in the foregoing cases.

By section 1 it is provided that :

“ Hereafter no pole shall be erected, nor any wire or other apparatus, used in connection with the transmission of electricity, be placed in position, in any street or alley of this city, until the city engineer shall have first determined upon the size, quality, character, number, location, condition, appearance, and manner of erection, of such poles, wires or other apparatus.”

and in the following provisions of that section it is provided that whenever, in the opinion of the city engineer such poles, wires and apparatus need changing, such change shall be made by the owner who shall put them in such condition as the city engineer shall designate in writing.

Observe that there is no rule for the guidance of the engineer in this matter and no rule by which the owner of the poles and wires can know in advance, or in any other way save by the arbitrary directions of the city engineer with respect to whether its wires, poles and apparatus conform to the requirements of the ordinance.

Further, in section 4 of the ordinance the Committee on Streets is given authority to require any person or company owning poles to allow any other person or company to place upon its poles and in such positions thereon as the Committee may from time to time deem proper, and which will not, in the opinion of the Committee unreasonably interfere with the business of the person or company owning the poles, and in the event that the owner and the person or company desiring to use said poles cannot agree upon satisfactory terms and conditions, it is required to be submitted to arbitration. Here, again, no rule is laid down but the question is left to the arbitrary determination of the committee. Later in the section the committee is given power to require the owner to allow any person or company desiring to enter upon and use such poles, to so enter and use the same under such conditions as the city

engineer may prescribe, as soon as the said company or person so desiring to enter shall have appointed its arbitrator.

By section 15 of the ordinance, it is made the duty of the Chief of the Fire Department and the Superintendent of Fire Alarm and Police Telegraph to examine and inspect, from time to time, all poles and every wire or cable over the streets, public grounds or buildings, and to notify the person or corporation owning or using such poles, owning or operating any such wire or cable when any such pole is unsafe or whenever its attachments, insulations, supports or appliances are unsuitable or unsafe, and require that said poles, wires or cables must be properly replaced, renewed, altered or constructed.

There is no objection whatever to the examination or inspection of the poles, wires and cables, nor to any requirement that they shall be made safe when unsafe, but in permitting these officers to determine that any such pole, wire or cable, with its attachments, insulations, supports or appliances are *unsuitable*, we have a requirement which depends upon the arbitrary judgment of these officers, and no standard is set in the ordinance by which the telegraph company may know to what it is to conform.

Again, the word "suitable" in the opinion of these officers may relate to matters purely local, and not to any matter to which the public safety or convenience of the people of Richmond are in any respect concerned. Of course, their judgment as to what is "unsuitable" with respect to attachments, insulations, supports or appliances with which these wires are worked will govern their determination as to the extent to which the renewal, alteration or reconstruction of these wires, cables, attachments, insulations, supports and appliances will have to be made.

By section 26, any person failing to perform any requirement made under the chapter by the city engineer, the Superintendent of Fire Alarm and Police Telegraph Department or Chief of the Fire Department, as to which there is not in the chapter a fine specially imposed, shall be liable to a fine of not less than \$10, nor more than \$500, to be imposed by the Police Justice of said city. Observe that this is a general requirement which these parties are permitted to

make without rule and without regulation imposed by the ordinance limiting their discretion in any way.

We come now to section 28, which is one of the sections relating to underground wires, and we find a requirement, first, that plan and details therefor must be submitted to the Committee on Streets, which plans may be altered or amended by the committee, and when satisfactory to the committee, it is made the duty of the owner to proceed with the construction of the conduits in accordance with the plans in a manner satisfactory to the city engineer. Further, the pavement is to be replaced to the satisfaction of the city engineer. The location, size, shape and subdivision of such conduits, and the material of which they shall be made and the manner of construction shall be satisfactory to the city engineer. The work of laying these underground conduits, tubes, pipes, electrical conductors, cables and wires to be under the direction and to the satisfaction of the Superintendent of Fire Alarm and Police Telegraph, with not a word in the entire ordinance from which the owner of the wires, thus required to present the plan and details to the satisfaction of these officers, can tell in advance what will be a compliance with the ordinance.

With respect to the question arising upon these sections the language of the Supreme Court of Maryland in the case of Mayor, etc., of Baltimore vs. Radecke, cited *ante*, is pertinent.

This was a case respecting the use of steam engines within the city limits, and in speaking of the ordinance it is said :

“ It does not profess to prescribe regulations for their construction, location or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order for removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not

choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no *rules* by which its *impartial execution* can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partizan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power, hardly falls within the *domain of law*, and we are constrained to pronounce it inoperative and void."

This case approved by this court in *Yick Wo vs. Hopkins*, 118 U. S., 371 (see *post*, pp. 20, 21).

Commenting upon the cases where courts have held void ordinances prohibiting certain acts without the consent or permit of the common council or the mayor or other executive officer, because they submit the rights of individuals to the unrestrained discretion of the council or official, Judge DILLON, in section 598 of his work on *Municipal Corporations* (5th Ed.) says :

"It has been said of ordinances of this nature that they remove the rights of the individual from the domain of law and subject them to the exercise of arbitrary discretion on the part of the council or the officer upon whom the dispensing power is conferred ; that it is unreasonable to reserve the right to grant or withhold the privilege as it may suit the pleasure of the council or officer, and that to be valid an ordinance of this nature must lay down a uniform rule of action governing the exercise of the dispensing power."

In *Barthet vs. City of New Orleans*, 24 Fed., 363, we have the following case : The City of New Orleans, by Article 248 of the Constitution of Louisiana, is vested with the power to regulate the slaughtering of cattle, etc., within its limits. Under this constitutional provision the city passed several ordi-

nances designating the places where cattle might be slaughtered, and prescribed in detail the regulations under which such business should be conducted. Barthet, at great expense, constructed buildings and engaged in the business of slaughtering cattle within the limits so prescribed. Subsequently an ordinance was passed amending the ordinance passed in accordance with the article of the Constitution. The original ordinance provided that "it shall be lawful for any person or corporation to keep and maintain slaughter houses, etc., within certain limits, under certain regulations." The amendment mentioned makes it *unlawful* to keep and maintain slaughter houses within said limits prescribed in the original ordinance, and under said regulations "except permission be granted by the council of the city of New Orleans."

In holding this ordinance void, the court says :

"The amendment of May 19th is, we think, unconstitutional, in the fact that if it is carried out, as the city attorney admits it will be, it will make Barthet's right to engage in a lawful business dependent upon the arbitrary will of an individual or a body of individuals acting for the city. The city has no governmental or special power to prevent any one, who complies with the law regulating such business, from engaging in lawful business as he prefers. * * * If the city council, as the matter now stands, can prevent him from so doing simply because he has not their permission, then he has not that equal protection of the law guaranteed in the constitution. The ordinance of May 19th transcends not only the limitations on legislative authority presented in the constitutions of the federal and state governments, but in our opinion it transcends those limitations, also, which spring from the very nature of free government.

"The city council has the right, generally, in the exercise of governmental powers, such as belong to municipal corporations, to regulate the business of slaughtering animals for food; but under the articles 248, 258, state constitution,—responsive as those articles are to a public sentiment long offended in this city by oppressive monopolies in the slaughtering of cattle for food,—it must be apparent that the city cannot, directly or indirectly, prohibit the business of this complainant under the pretense of exercising an ordinary governmental police power.

"It is clear that those articles were intended to prohibit all monopolies, and to limit rather than to enlarge the police powers of the city in relation to slaughtering cattle, etc., and if the city can refuse to permit Barthet to carry on his business, it can adopt the same course with others, by giving its permission to an individual or to a corporation and refusing it to all others, a monopoly could be established by the favored suiter. *An ordinance which permits one person to carry on an occupation within municipal limits, and prohibits another who had an equal right from pursuing the same business,—is void.*

In that case complainant's right within the limited district was fixed by the ordinance enacted in pursuance of the articles of the constitution cited, and his rights within that district were dependent upon that legislation, *i. e.*, he could carry on his business, even though perfectly lawful, only within that restricted territory. The Western Union Telegraph Company, under the grants of the Act of Congress of July 24, 1866, has the unrestricted right to carry on its business in any streets of the city of Richmond, and it is, therefore, even less subject to molestation than the complainant in that case by reason of the control of individuals whose discretion is of necessity more or less arbitrary and sure to result in a violation of the rights of the telegraph company in the performance of its business of transmitting messages between citizens of the different states.

In Frazee's case, 63 Mich. 396; 30 N. W., 72, the Supreme Court of Michigan had under consideration an ordinance of the city of Grand Rapids providing that "no person or persons, associations or organizations, shall march, parade, ride or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of said city."

In holding this ordinance void, the court remarks:

"Whatever regulation is made must operate uniformly, under the same conditions. All by-laws made to regulate them must fix the conditions expressly and intelligibly, and not leave them to the caprice of anyone. This doctrine, as applied to public officers, was

recognized in *Horn v. People*, 26 Mich., 231. It is quite as applicable to the common council, acting by resolution on particular cases. The law must be impartial and general, or it is no law. *Waite v. Local Board of Garston*, L. R., 3 Q. B., 5. It is only where power is given to license that permissive action can be left to particular cases. If this were allowed in the case of processions, it would enable a mayor or council to shut off processions of those whose notions did not suit their views or tastes, in politics or religion, or any other matter on which men differ. *When men in authority have arbitrary power, there can be no liberty.* * * * This by-law is unreasonable, because it suppresses what is in general perfectly lawful, and because it *leaves the power of permitting or restraining processions, and their courses, to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent, legal provisions, operating generally and impartially.*"

An ordinance of the same general character was under consideration in *Anderson vs. City of Wellington*, 40 Kas., 173; 19 Pac., 719. The court says :

" It is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission to any association of persons, combined for legal and meritorious purposes, to parade the streets with music. * * * All by-laws made to regulate parades must fix the conditions upon which all persons or associations can move upon the public streets, expressly and intelligently, such conditions operating on all of the same class alike, and being reasonable in their requirements, and not oppressive in their operation ; and must not give the power of permitting or restraining processions to an unregulated official discretion, and thus allow an officer to prevent those with whom he did not agree on controverted questions from calling public attention to the principles of their party, or the objects of their organization, in one of the most effectual methods known to associated effort."

To the same effect is the case of *City of Chicago vs. Trotter*, 136 Ill., 430 ; 26 N. E., 359, where it is said :

" The ordinance in question seems to recognize the fact that all processions are not to be repressed and

seems to proceed upon the theory that some of such demonstrations are to be allowed and permitted, and others prevented. It does not, however, fix and determine the conditions under which parades and processions will be unlawful. It merely leaves it to the discretion or caprice of the superintendent of police to imperatively prescribe who shall be permitted to gather together in such processions and who shall not, to dictate that the members of one political party, or of one religious denomination, or of one civic society may, and the members of another political party, religious denomination or civic society may not have such parades or processions; and to arbitrarily fix the times, occasions and localities when and where such assemblages will be allowed. Under the ordinance the superintendent of police has even authority to prohibit all street parades and processions whatever. It is subversive of the liberty of the citizen, and outside of the domain of the law, that authority so arbitrary should be lodged in one person," citing *in re Frazee, supra*.

In *Cicero Lumber Co. vs. Town of Cicero*, 176 Ill., 9; 51 N. E., 764, the Supreme Court of Illinois had before it for consideration a municipal ordinance constituting certain streets driveways for pleasure vehicles only, and requiring the obtaining of special permission from the board of trustees for the use of the same.

In the course of the opinion, the following appears :

" But the other ground upon which the ordinance of May 23d, 1896, is attacked as invalid is of a more serious character. By the ordinance of May 23, 1896, all persons are forbidden to take any omnibus or heavy vehicle or any traffic vehicle upon either of the boulevards therein named, except private wagons conveying families 'or upon special permission as this board.' The meaning of this provision is that all traffic vehicles except private wagons conveying families, are only forbidden the use of the boulevards in case their owners do not obtain the special permission of the board of trustees. In other words the discretion is lodged with the board of trustees to permit or not to permit traffic vehicles to be used upon the boulevards in question. The ordinance, in so far as it invests the board of trustees with the discretion here indicated, is unreasonable. It prohibits that which is in itself, and as a general thing, perfectly lawful, and leaves the power of

permitting or forbidding the use of traffic teams upon boulevards to an unregulated official discretion, when the whole matter should be regulated by permanent legal provisions operating generally and impartially. The ordinance is not general in its operation. It does not effect all citizens alike who use traffic vehicles. It is only persons driving traffic vehicles upon the boulevards without the permission of the board of trustees who are subjected to the penalties of the ordinance. *The ordinance in no way regulates or controls the discretion vested thereby in the board. It prescribes no conditions upon which the special permission of the board is to be granted.* Thus, the board is clothed with the right to grant the privilege to some and to deny it to others. Ordinances which thus vest a city council or a board of trustees with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few are unreasonable and invalid. The ordinance should have established a *rule by which its impartial enforcement could be secured.* This position is sustained by the weight of authority. *City of Chicago v. Trotter*, 136 Ill., 430, 26 N. E., 359; *Rich v. City of Naperville*, 42 Ill. App.; *In re Frazee*, 63 Mich., 396, 30 N. W., 72; *City of Plymouth v. Schulthels*, 135 Ind., 701, 35 N. E., 14; *State v. Barenstein*, 66 Iowa, 249, 23 N. W., 652; *Commissioners, etc., of Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St., 318; *Austin v. Murray*, 16 Pick., 126; *Landis v. Borough of Vineland*, 54 N. J. Law, 75, 23 Atl., 357; *State v. Mahner*, 43 La. Ann., 496, 9 So., 480; *State v. Dulaney*, 43 La. Ann., 500, 9 So., 481; *Wo Lee v. Hopkins*, 118 U. S., 356, 6 Sup. Ct., 1064; *Newton v. Belger*, 143 Mass., 598, 10 N. E. 464; 1 Dill. Mun. Corp. (4 Ed.) Sec. 321; *Baltimore v. Radeke*, 49 Md., 217."

We ask this Court to consider the relative legal positions of the Western Union Telegraph Company and of those affected by the five cases from which quotations have been made, with respect to the use of the streets, and the superior position of the telegraph company in the case at bar as compared with the position of the persons affected by the various street ordinances just under discussion. If a city is without power to pass an ordinance with respect to the use of its streets for parades and processions, giving to some particular committee or officer an arbitrary discretion with respect to granting permits therefor, how much less defensible its position must be when it seeks to give this same committee or officers

an absolute control over a public utility engaged in interstate traffic, an agency of the federal government and which, as such, has had secured to it certain absolute rights to occupy any of the streets from which the city seeks, by this ordinance, to bar it except upon the arbitrary conditions named by it.

In *City of Newton vs. Belger*, 10 N. E., 464, cited above, the Supreme Judicial Court of Massachusetts held invalid an ordinance providing that no person shall "erect, alter or rebuild, or essentially change, any building or any part thereof, for any purpose other than a dwelling house, without first obtaining in writing a permit from the board of aldermen." In touching upon the question the court remarks:

"It does not require the board of aldermen to adjudicate and determine that it is necessary to prohibit any proposed building for the purpose of securing the prevention of fire or the preservation of life. On the contrary, it gives them the power, by refusing a permit, to prevent the erection of any building except a dwelling house for any reason which may be satisfactory to them. Under the ordinance, they may refuse a permit because in their opinion it is desirable that certain parts of the city shall be used only for handsome dwelling houses, and that all buildings for the purposes of trade should be excluded, though in no sense dangerous."

Upon this point we desire to call to the attention of the court the clear statement of the law contained in the case of *State vs. Tenant*, 14 S. E., 387, where the Supreme Court of North Carolina says:

"Police power may be exercised by the sovereign state through the general assembly in derogation of the absolute right of the individual only for the general benefit, and by means of statutory provisions that upon their face operate indiscriminately upon, and are enforceable by the same species of process against all persons and classes.

* * * * *

"Towns and cities cannot use their power to create monopolies for the benefit of private individuals, nor can they pass by-laws imposing penalties that do not operate equally upon all citizens of the state who may come or live within the corporate limits.

* * * * *

"It is equally clear that if an ordinance is passed

by a municipal corporation, which upon its face restricts the right of dominion which the individual might otherwise exercise without question not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the *arbitrary will of the governing authorities* of the town or city, it is unconstitutional and void, because it fails to furnish a *uniform rule of action*, and leaves the right of property subject to the *despotic will of aldermen*, who may exercise it so as to give exclusive profits or privileges to particular persons." Citing numerous cases.

To the same effect is the case of *City of Sioux Falls vs. Kirby*, 60 N. W., 156, in considering the validity of an ordinance requiring a permit to be procured from the building inspector. The language of the ordinance under consideration was :

" If satisfied that such building, alteration or repair is in compliance with the provisions of this chapter, the building inspector shall give his permit for such proposed building or structure on payment of the fees prescribed in the next section."

In passing upon the legality of this provision, the court says :

" The city council by the ordinance in controversy, it will be noticed, has not only assumed to require a permit to be procured for the erection of any building or structure within the city limits, and to require a fee to be paid therefor, but has provided that this permit can only be obtained from the inspector when he is 'satisfied that such building, alteration or repair is in compliance with the provisions' of that chapter. * * * The right of a person to use and improve his property as he may deem proper, consistent with law, is a constitutional right, of which he cannot be deprived at the mere will and pleasure of a city council or of any officer appointed by it. * * * It does not merely forbid the erection of any building which is hazardous, or which exposes property or persons to danger from fire ; but it requires of the landowner that he obtain a permit from the inspector, and pay the prescribed fee therefor, which may be granted or withheld by such inspector, as he may or may not be satisfied that the building

complies with the requirements of the ordinance, which, as we have seen, makes no provision as to what shall be deemed necessary to constitute a safe construction. It is clear that the ordinance in controversy, upon its face, attempts to restrict the right of dominion which every individual possesses over his property, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own property depend upon the arbitrary will of the city inspector, and therefore make the right of the citizen to use his property subject to the will of such inspector, from whose decision no appeal is given. Such an ordinance cannot be sustained." Citing cases.

On this point, also, we have the decision of the Court of Appeals of Kentucky, in *Boyd et al. vs. Board of Councilmen of the City of Frankfort*, 77 S. W., 669, where the court says :

"The case being before this court on the appeal, we will consider first the objection urged to the constitutionality of the ordinance by virtue of which it is contended by the appellees that the common council of the city of Frankfort had the right to refuse appellants permission to erect the church upon the lot owned by them. A careful reading of the ordinance will show that it fixes no standard by which the action of the city council in granting or refusing its consent is to be controlled. The consent of the council can be given or withheld at its own *arbitrary pleasure*. This ordinance, though far more arbitrary, is very similar to those mentioned in the case of *Yick Wo v. Hopkins*, 118 U. S., 356, 6 Sup. Ct., 1094, 30 L. Ed., 220. The ordinance in that case contained provisions to the effect that it shall be unlawful for any person or persons to carry on a laundry within the limits of San Francisco without first having obtained the consent of the municipal authorities except the same be located in a building constructed either of brick or stone; and unlawful to erect scaffolding over or upon the roof of any building without first obtaining such consent. In commenting upon the arbitrary provisions indicated, the Supreme Court said :

"There is nothing in the ordinance which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary

power to give or withhold consent, not only as to places, but as to persons. So that if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them the authority to withhold their assent without reason and without responsibility. The power given to them is not confined to their discretion in the legal sense of that term, but is granted to their mere will. It is *purely arbitrary and acknowledges neither guidance nor restraint.* * * * no reason for it is shown, and the conclusion cannot be resisted that no reason for it existed except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the Constitution. The imprisonment of the petitioners is therefore illegal and they must be discharged.'

"The very fact that the ordinance complained of in this case confers upon the council the absolute right to refuse its consent to the erection of any building, no matter out of what material it is to be constructed, where it is to be erected, or how necessary and useful to the public it might be, demonstrates the *danger of intrusting any body of men with such arbitrary and despotic power.*"

The case of *Yick Wo vs. Hopkins*, 118 U. S., 356, quoted in the preceding case, deals with an ordinance of the city and county of San Francisco, containing the following provisions:

"SEC. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed of either brick or stone.

"SEC. 2. It shall be unlawful for any person to erect, build, or maintain, or cause to be erected, built or main-

tained over or upon the roof of any building now erected or which may hereafter be erected within the limits of said city and county, any scaffolding, without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used, and such scaffolding shall not be used for any other purpose than that designated in such permit."

After a general discussion of the law applicable to the case, including the quotation therefrom on page 19 of this brief, the court on page 371, continues :

" The same principle has been more freely extended to the quasi-legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these, it was the doctrine, that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject of the rights of private property. Dillon on Municipal Corporations, 3rd Ed., sec. 319, and cases cited in notes. Accordingly, in the case of the State of Ohio *ex rel.*, etc. v. The Cincinnati Gas Light & Coke Company, 18 Ohio St., 262, 300, an ordinance of the city council purporting to fix the price to be charged for gas, under an authority of law giving discretionary power to do so, was held to be bad, if passed in bad faith, fixing an unreasonable price, for the fraudulent purpose of compelling the gas company to submit to an unfair appraisement of their works." Citing and quoting from *City of Baltimore v. Radeke*, 49 Md., 217 (*ante*), pp. 7 and 10.

On this point, see also *State ex rel. Omaha Gas Co. vs. Withnell*, 110 N. W., 680, where an ordinance regulating the construction of buildings in the city of Omaha, and providing that it shall be unlawful to erect a gas tank or holder therein without the written consent of the owners of all the property within a radius of 1,000 feet from the site of such structure, is held void. The court says, on page 682 :

" We are not without judicial precedent of the highest character for our conclusion, and it has been

held not only that the governing body cannot commit the exercise of its legislative discretion to property owners or other private persons, but that it cannot intrust it to the caprice of any of the officers of the city, and even that it cannot reserve to itself, in its administrative rather than its legislative capacity, an absolute and despotic power to grant or refuse permits of the character in question, in particular cases and in the absence of, or without reference to, prescribed and duly enacted rules and regulations," citing Mayor of Baltimore, etc. v. Radecke, and other cases referred to herein.

In *People ex rel. Robison, Pros. Atty. vs. Miner*, 37 N. W., 21, the Supreme Court of Michigan had occasion to consider the validity and constitutionality of the Michigan Liquor Law which provided for the giving of a bond, with sureties, to be freeholders of the municipality holding no office unless that of Notary Public, not sureties on any other bond, and owners of real estate, etc. The bond was to be approved by the municipal board of trustees or council upon affidavits, and if, in the judgment of that body, the sureties are inadequate, "or if the principal of said bond is known by said township board, or the board of trustees or common council of the village or city to be a person whose character and habits would render him or her an unfit person to conduct the business of selling liquor, they, the said township board or board of trustees, the council or common council of the village or city, as the case may be, shall refuse to indorse said bond with their approval."

In passing upon the provision just quoted, the court says:

"While the bond is fixed or capable of being fixed in amount, the statute allows the local body approving the bonds to refuse doing so to any person whose character or habits would render him or her an unfit person to conduct the business of selling liquor, and this is done on their supposed knowledge of their unfitness. Such a refusal may operate to the ruin of the applicant and a practical destruction of his business, and injury to a forfeiture of the enjoyment of his property cannot be avoided. Where licenses are granted to a limited number of people it is sometimes provided that applicants shall present evidence of character in the place where they live, but it would be anomalous to allow anyone to be disqualified from business and branded

with disgrace, both of which are really heavy punishments, on the mere will of anybody. * * * The subject was somewhat discussed in *Dullam v. Willson*, 53 Mich., 392, 19 N. W. Rep., 112, where many cases were referred to, showing the right of accused parties to know what they are accused of, and to have a hearing which will give them means of fairly meeting the charges. Without this there can be neither fairness nor uniformity in the operation of the law. If no standard is laid down, there may be as many scales of fitness and unfitness as there are boards, * * * If the statute had fixed the rule, there would be means of protecting parties against caprice and condemnation unheard, but when the same persons are to be judges of the proper causes of rejection as well as of the fitness of persons under such causes, the law subjects everyone to the mere will of his neighbors, and gives him no rights whatever. *No man's rights can be submitted under a constitutional government to the discretion of anybody.*"

The Supreme Court of Louisiana also had occasion to consider this question in *State vs. Mahner, et al.*, reported in 9 So., 480, where it had before it the question of the validity of an ordinance prohibiting dairies within certain limits, but giving the city council authority to grant permission to conduct them within the limits named. The following is from the opinion :

"The objectionable feature of the ordinance is contained in the first section. This section prescribes the limits within which dairies may be conducted by permission of the city council, and it is made unlawful to keep more than two cows without a permit from the city council. The defendants are within the prohibited limits and keep more than two cows. The ordinance is not general in its operation. It does not affect all citizens alike who follow the same occupation which it attempts to regulate. It is only those persons who keep more than two cows in the prohibited limits, without the permission of the city council who are subjected to the penalties in the ordinance. *The discretion vested by the ordinance in the city council is in no way regulated or controlled.* There are no conditions prescribed upon which the permit may be granted. It is within the power of the city council to grant the privilege to some and to deny it to others. The discretion vested in the council is *purely arbitrary*. It may be

exercised in the interest of a favored few. It may be controlled by partisan considerations and race prejudices, or by personal animosities. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented," citing various cases.

In *May vs. People*, 27 Pac., 1010, the Court of Appeals of Colorado followed the same line of decisions as heretofore indicated and held an ordinance prohibiting the storing of hides within the city "without permission from the city council" to be void within the principles heretofore pointed out.

The Supreme Court of Indiana likewise follows the decisions heretofore cited in the case of *City of Richmond vs. Dudley*, and holds that :

"A City ordinance prohibiting the storage by any person within the city limits, of inflammable oils, except upon permission from the common council, leaving it to the common council to say whether a particular place is suitable for the purpose, or a particular person is a proper one to whom to grant permission, and allowing the permission to be revoked at the will of the council, is invalid, because of the power of arbitrary discretion it vests in the council."

The Supreme Court of Missouri, in the *City of St. Louis vs. Russell*, 22 S. W., 470, follows the principles hereinbefore quoted with respect to an ordinance providing that lot owners shall be permitted to determine whether a person shall erect a livery stable in the block in which their property is located, holding such an ordinance to be invalid. The language used by the court and the cases cited are so nearly identical with the other cases herein noted that it is hardly necessary to do more than call attention to the case as following the universal rule that the law will not permit one person's rights to be placed in jeopardy by making them subject to the whims and idiosyncrasies of those whom the city authorities may seek to place in control.

See, also, *Los Angeles County vs. Hollywood Cemetery Assn.*, 57 Pac., 153, where the Supreme Court of California declares void the ordinance of Los Angeles County, prohibit-

ing the establishment of cemeteries without permission of the county supervisors, as not a valid police regulation within the constitution, since the ordinance does not regulate, but prohibits the pursuit of a lawful business by making the right to exercise such calling dependent upon the will of the supervisors.

In *Noel vs. People*, 58 N. E., 616, the Supreme Court of Illinois had before it for consideration the Pharmacy Act, Sec. 2, Hurd's Rev. St., 1897. Section 8 of the Act is as follows :

"The Board of Pharmacy may in their discretion issue permits to persons, firms or corporations engaged in business in villages or other localities, empowering them to sell the usual domestic remedies and proprietary medicines under such restrictions as the board of pharmacy may deem proper. Each applicant for this permit shall pay to the said board the sum of one dollar before said permit shall issue. Said permit shall specifically state just what the holder thereof is allowed to sell."

On page 618, the court says :

"It is manifest that section 8 vests an arbitrary power in the board of pharmacy to say who shall and who shall not sell the usual domestic and proprietary remedies in villages and other localities, and just exactly what they are allowed to sell. Section 8 in no way regulates or controls the discretion vested thereby in the board. The official discretion conferred upon the board is unregulated, and not subjected to any permanent provisions operating generally and impartially. No conditions are prescribed upon which the permit authorizing the sale of the usual domestic remedies and proprietary medicines is to be issued. *A law which thus invests any board or body of officials with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid.* It makes an unjust discrimination between persons coming within the same class. A person, firm, or corporation engaged in business in a village or other locality may sell these domestic remedies and proprietary medicines if a permit is obtained from the board of pharmacy, provided such board sees fit, in its discretion, and under such restrictions as it may deem proper, to permit such permit. The board is thus authorized to confer a

privilege upon one person, firm or corporation, and to deny the same privilege to any other person, firm or corporation, and is not required to be governed, in doing so, by any fixed rules or regulations, but may be moved thereto only by its own caprices and favoritism."

In *City of Elkhart vs. Murray*, 165 Ind., 304, 75 N. E., 593, the Supreme Court of Indiana held that a city ordinance providing that it shall be unlawful on and after a certain date to run any street car without having securely fastened to its front end a proper automatic fender made by a particular fender company or some other fender equally as good, to be approved by the common council or its street committee, was void for non-uniformity.

The court says :

"The ordinance must contain permanent legal provisions operating generally and impartially upon all within the territorial jurisdiction of such city, and no part thereof be left to the will or *unregulated discretion* of the *common council or any officer*. (citing cases)
* * *

"In *Bessonies v. City of Indianapolis*, 71 Ind., at pages 197 and 198, this court said: 'Without any provision as to the location or management of hospitals, the ordinance attempts to make it unlawful for anyone to establish or conduct one without a license or permit from the common council and board of aldermen; and the granting or refusal of the license or permit is not governed by any prescribed rules, but rests in such case in the uncontrolled discretion of the common council and board of aldermen. It is apparent that under the ordinance, if valid, the common council and board of aldermen have the power to grant or refuse the license in any given case at their mere pleasure, and that no one can conduct or maintain an hospital within the city, however harmless or beneficial it might be, except by the consent of the common council and board of aldermen. It is not necessary to suppose that the common council and board of aldermen would abuse the power thus assumed by them to grant or refuse the license as they might think for the public good. It is sufficient to say that, if the ordinance is valid, the common council and board of aldermen have it in their power to grant one person a license and refuse another under the same circumstances. *No law could be valid which by its terms would authorize the passage of such an ordinance.*'"

The city of Montgomery, Ala., enacted an ordinance forbidding the operation of steam engines, planing mills, foundries, blacksmith shops, etc., within the city limits without first obtaining the consent of the council. The ordinance was held invalid by the Supreme Court of Alabama in *City Council of Montgomery vs. West*, 42 So., 1000, following the cases herein referred to.

It will thus be seen that it is the well established rule that an ordinance placing within the hands of any official or group of officials the arbitrary power to grant or withhold any privilege to any person, company or corporation must be held bad. It is not necessary that it appear that the person or persons in whose hands this discretion is vested will or even might misuse the power thus given to the injury of any particular person; it is enough that such enormous power is placed in the hands of any one official to stamp the ordinance granting such power as illegal and void. The cases uniformly recognize the proneness of city officials to be guided by their personal feelings, their prejudices and their individual beliefs and opinion in the granting or withholding of the privileges thus attempted to be placed within their power, and in one accord unite in holding that such an attempt to subject the citizens to the whims and fancies of another citizen or group of citizens is beyond the domain of the law.

SECOND.

The ordinance imposes excessive fines and penalties for the failure to obey the arbitrary orders of the city officials in matters concerning which the company has no guide except the direction of these officers.

This court has had occasion to consider the validity of legislation of a state which seeks to enforce its provisions by excessive fines and penalties. In *ex parte Young*, 209 U. S., 123, this question was considered, and Mr. Justice PECKHAM,

in giving the decision of this court, following the case of *Cotting vs. Kansas City Stock Yards*, 183 U. S., 79, *et seq.*, says :

"It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws. * * * It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

Turning now to the ordinance in question we find that in section 4 which provides for other companies being permitted to string wires upon poles of telegraph companies, it is also provided that for any failure to perform any requirement ordered under this section within ten days after being notified of such requirement by the city engineer, each party so in default shall be liable to a fine of not less than \$50 nor more than \$500; each day's failure to be a separate offense.

So, by section 13 failure to pay a fee of two dollars on each pole as required by section 10, or to have the tin plate fastened thereon renders the owner of each pole owned, possessed or maintained by him liable to a fine of not less than \$5 nor more than \$100 for each pole for which they are so in default, and each day of default is again made a separate offense.

So, by section 14, failure to remove any pole which the Superintendent of Fire Alarm and Police Telegraph orders removed, within forty-eight hours after receipt of notice, renders the owner liable to a fine of not less than \$10 nor more

than \$50 and each day's failure is again made a separate offense.

Under section 15 any failure to perform any requirements made by either the Chief of the Fire Department, or Superintendent of Fire Alarm and Police Telegraph under that section, which is one involving inspection and repair, the owner to make such changes as the Chief of the Fire Department or Superintendent of Fire Alarm and Police Telegraph may consider necessary or in their opinion *suitable*, subjects the owner to a fine of not less than \$5 nor more than \$100, each day's failure to be a separate offense. That is to say, if, upon an inspection by either of these two officers they find a pole which, in their opinion, is unsafe or any wire cable, insulators, supports or appliances which in their opinion are unsuitable, and they require what, in their opinion, is a proper replacing, renewal, alteration or reconstruction, failure to comply with such requirements, no matter what they are, renders the owner liable to the fines and penalties imposed.

It is to be observed that there is no rule for the telegraph company except the arbitrary discretion of these two officers, or either of them, as to what is unsafe or unsuitable, or as to what is a proper replacing, renewal, alteration or reconstruction, and there is no appeal provided from the order they may make under this section.

Again, by section 26, in order that there might be no chance of escape, it is provided that:

"Any person violating any restriction, provision or condition imposed by this chapter, or failing to perform any requirement, made under this chapter by the City Engineer, the Superintendent of Fire Alarm and Police Telegraph Department, or Chief of the Fire Department, as to which there is not in this chapter a fine specially imposed, shall be liable to a fine of not less than ten, nor more than five hundred dollars, to be imposed by the Police Justice of said city; each day's violation, or failure, to be a separate offense."

Again, by section 32, for failure to pay the amount of fees fixed by that section for the privilege of using and occupying the streets, on the 15th day of January and June of each year, and failure to render a sworn statement as to the number and

length of each of the wires then owned or used, the company is rendered liable to a fine of not less than \$10 nor more than \$500, each day's failure to be a separate offense. And by this section the Committee on Finance is entitled to examine the books of the company and for failure to allow such examination whenever requested by the committee, the person or corporation owning any wires in such conduits shall be liable to a fine of not less than \$100 nor more than \$500 for each wire of said person or company admitted or proven to be in such conduit.

THIRD.

The ordinance requires the company to furnish to the city large and extensive facilities for the doing of the city's business without compensation or reward therefor, and such compulsion is not a legitimate exercise of the police power.

Section 6 of the ordinance provides that :

" Each and every permission herein given is granted upon the condition that the city shall have the right by and through the Board of Fire Commissioners to run all wires needed for the fire alarm and police telegraph department on all poles erected, or allowed under this ordinance to remain on any street or alley of the city, and in such positions on said poles as shall seem proper to the superintendent of said department. Whenever any permission has been granted by the Council or Street Committee to any person or corporation to erect any pole or poles for the support of wires used for the transmission of electricity, it shall be the duty of such person or corporation, before erecting any such pole or poles, to submit to the Board of Fire Commissioners a diagram showing the propose location of such pole, and arrangement of poles and wires, so as to enable said superintendent to *select and require to be reserved such positions on any such pole or poles as he may deem proper and necessary.*"

The foregoing section controls in all cases of overhead wires.

Section 28 relates to underground construction, and as amended and sought to be enforced at the time the injunction was sued for by complainant, provided as follows :

"Such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys, and shall provide for an increase thereof to at least the extent of 30 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership or individual directly or indirectly without the consent of the Committee on Streets and Shockoe Creek, *but the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires.*"

The Act of Congress conferring upon the telegraph company the right to construct, maintain and operate lines of telegraph along any of the military and post roads of the United States contains one proviso only :

"provided that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

Under this proviso the city has power to regulate the height of poles and character of construction to secure the safety and convenience of the public ; under this proviso it can make police regulations which shall fairly secure the non-interference by the telegraph company's lines with the ordinary travel on the post roads. This, it is conceded by complainant, may be extended, in the thickly populated parts of cities, to requiring poles to be removed and the wires placed underground, but this does not authorize the city to impose as a condition of the company being permitted upon the streets to maintain the city's lines of wire, or subject the telegraph company's poles to unlimited use by the city for its wires free of charge. This is not regulation ; it is a form of taxation making the telegraph company's right to be upon the streets dependent upon the company furnishing free of charge a substantial financial benefit to the city.

If it be claimed that the city has a right to a rental for the space occupied by the poles under the principles of the decision of this court in *Western Union Telegraph Company vs. St. Louis*, it may be answered that under the principles of that case, it is only entitled to charge a reasonable compensation for the use of the streets, and the city is not the arbitrary judge of what is reasonable, because it is expressly decided in that case that the city is not the arbiter as to what is reasonable compensation, but the matter is to be left for determination by the courts. If this be treated as in the nature of rental, it will be observed that this ordinance gives no right to the telegraph company to secure a determination in the courts, as to whether or not the amount asked for the occupancy of the streets is reasonable, but its right to be upon the streets at all with its poles is, by this ordinance, made dependent upon its first submitting to the Board of Fire Commissioners a diagram and submitting to a selection and reservation upon that diagram of all the space upon the poles which may arbitrarily be decided by this Board to be required for the use of the city.

In the *St. Louis* case a certain sum for each pole was charged by the city annually, and it was held by this Court that that sum was *prima facie* a reasonable charge for the occupation of the streets. By section 10 of this ordinance, there is in addition to this unlimited use of the poles by the city wires a fee of \$2.00 charged annually for each telegraph pole set in the city, and the testimony in the case makes it perfectly clear that no such sum would be required for the inspection necessary to ascertain that the pole was constructed and properly maintained with due regard to the safety and comfort of the public. The testimony in that respect is clear that the cost of such inspection would be a mere nominal sum.

With respect to the right of the city to regulate the use of its streets, it is stated by Judge DILLON in the latest edition of his "*Municipal Corporations*" that:

"Concerning *useful trades and employments* a distinction is to be observed between the power to 'license' and the power to 'tax.' In such cases the former right, unless such appears to have been the intent, does not give the authority to prohibit, or to use the license

as a mode of taxation with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged" (Dillon on Municipal Corporations, 5th Ed., Vol. 2, Sec. 661).

This text is quoted with approval in *State vs. Bean*, 91 N. C., 554, which holds that the power to license the carrying on of trades is a police power and does not confer power to use the license as a mode of raising revenue.

In *State vs. Hoboken*, 33 N. J. L., 280, the City of Hoboken had been given the power to regulate the building of vaults and the laying of water and gas pipes, in and under the streets, and to secure to the public the safe and convenient use of the streets and sidewalks. The city passed an ordinance requiring applicants for permission to build vaults in front of their premises to pay for such permission to the city treasurer the sum of twenty cents for every square foot of space occupied by the vault. The right to exact this fee was contested before the Supreme Court, and Justice DEPUE thus discusses the power of the city :

"The requirements of the filing of the description of the proposed vault, and previous permission of the corporate authorities to its construction, and its speedy completion after it is enclosed, and the maintenance of a light during the night, while the surface of the street is interfered with, are clearly regulations authorized by the city charter, which it is competent for the common council to enforce by reasonable penalties, such as are elsewhere prescribed in the ordinance. But the exaction in question, graduated by the capacity of the vault, is in no sense a regulation, such as is contemplated by these provisions of the city charter. It is a tax, or assessment, upon the owner or occupier of lands, for permission to improve the same for their more convenient use.

"In the classification of corporate powers, the distinction between the power of taxation, and the usual police powers, which are granted for the maintenance of peace and good order in the city, and the administration of its internal affairs, is well settled. The functions of the latter are not primarily the raising of revenue. Incidentally, the public treasury may be benefited, as by the imposition of fines or penalties for the violation of city ordinances; by license fees, when the power is specially to license, and exact license fees; or under

powers to regulate markets, by the exaction of market fees, for the use of corporate property. But in all such cases the court must see that the imposition of the penalty, or the requirement of fees for the exercise of privileges, is a reasonable exercise of the powers of legislation granted to the corporation. In *Freeholders of Essex v. Barber*, 2 Halst. 64, this court held, that the charter of the borough of Elizabeth which gave to its municipal court powers to license inns and taverns, did not thereby authorize the borough to tax innkeepers, and receive fees from them for their licenses. In *Mayor, etc. v. Second Avenue Railroad Co.*, 32 N. Y. 261, the Court of Appeals of the State of New York held that an ordinance of the common council of the city of New York requiring the payment of fifty dollars annually for a license for every passenger car running in the city below One hundred and twenty-fifth street, was not a police regulation under the general powers of the city to make laws and ordinances for the good government of the city, but a tax upon the company for revenue purposes in derogation of its rights and property, and on that account unlawful and void. In *Kip v. City of Paterson*, 2 Dutcher, 298, an ordinance requiring all persons who sold hay or other produce, and delivered the same within city limits, to pay a fee of five cents, was held to be illegal and void as not authorized as a mode of taxation, and not being a reasonable exercise of the power of regulating the police of the city.

It will be observed that the power of the common council, under the provisions of the city charter above quoted, is an authority to regulate. The same language is used in the city charter with reference to the streets, sidewalks, squares and public grounds, and the running of locomotives through the city, and interments within the city, and bathing in the adjacent waters, and other matters coming within judicial cognizance. It could not be asserted with even a show of plausibility that over these subjects the city could exercise its authority for purposes of revenue. If the claim of the city is to be justified, it must be sustainable under those undefined powers which reside in a municipal corporation of passing ordinances for the maintenance of good order, within the corporate limits. Under such powers municipal ordinances for licensing hack drivers and cartmen, and also shows and exhibitions, and the requirement of a reasonable license fee thereon, have sometimes been sustained, but in such cases the court, when called upon to pass upon the

validity of such ordinances, must see that they are adopted to the maintenance of good order, and that the means adopted are a reasonable mode of attaining that end. Tested by this principle, that part of the ordinance under review fails to command approval either as being a police regulation for the maintenance of good order, or of a reasonable mode of accomplishing that end.

"The provisions of this ordinance, requiring the license fee in question, are not authorized as a mode of taxation, and are not a reasonable exercise of the power of regulating the police of the city. To that extent the ordinance is illegal and void, and must be set aside."

In State *ex rel.* Telephone Co. vs. City of Sheboygan, 111 Wis., 23, 86 N. W., 657, it was held that any action under the police power which results in pecuniary benefits to the city is an unreasonable exercise of that power by the city. The principle announced in that case is that the right of the city to secure pecuniary benefits to itself arises from its powers of taxation and not from its police powers.

The following is from the opinion :

"We do not see how, under the power it now possesses, the city can rightfully withhold action, or base affirmative action on the conditions of financial benefits to itself. Such contention must rest largely upon the supposed exercise of power to grant or refuse the right to use the streets. This, of course the city has no right to do except when the situation is brought within the rule stated in the City of Marshfield case (102 Wis., 604, 78 N. W., 735). We need not repeat what was there said relative to the right of the city to prohibit the erection of poles on certain of its streets. Such right must be exercised in the light of reason; not with a view of prohibiting the company doing business in any given locality, but reasonably to protect the public against unnecessary obstructions, inconveniences, and dangers, for the general welfare and common protection of all. The right to purchase relator's exchange (one of the conditions of the granting of the franchise) would be a contract right of great value. So also, as to the right to use the tops of the poles for the fire alarm system, and the agreement as to forfeiture of property to the city in case of nonuse. Such rights have no relation to the legitimate exercise of the power of police regulation. To permit the city to base its action upon

considerations of financial benefit to itself would be allowing it to put its powers up for sale to the highest bidder. Nothing could be more vicious. Very soon the interest of the public would be at the mercy of local boards. The company willing to yield the greater number of privileges or pay the most money would get the greatest favors. The embarrassments growing out of a recognition of the existence of this right are so manifest and so manifold that we need spend no time in discussing them. We say without hesitation that the city has no right to barter with the police powers, or exact for itself financial benefits as a condition for its exercise. Such power must be exercised for the public good and public welfare, and not for public gain."

In the case of Muhlenbrinck, Prosecutor, vs. Long Branch Commissioners and Augustus G. Lane, 42 N. J. L., 364, the Supreme Court of New Jersey had before it an ordinance concerning lincenses for peddlers.

The following is from the opinion of the court :

"The fifth section provides that 'there shall be charged to each and every person who shall have been a resident within the limits of the jurisdiction of the commission for six months prior to making application for such license, and paid to the city clerk issuing the same, the following sums, to wit: for each and every hawker and peddler, with the privilege of using one peddler's wagon, the sum of three dollars and for each additional wagon the sum of three dollars; for each and every wagon or other vehicle employed or used by dealers or merchants, in the delivery of goods, wares and merchandise, the sum of two dollars; and that there shall be charged to each and every person who shall not have been a resident within the limits aforesaid, for six months prior to making such application, the following sums: for each and every hawker, huckster and peddler using one peddler wagon, the sum of ten dollars, and for each additional wagon the sum of ten dollars; for each and every wagon or other vehicle employed by dealers or merchants, in the delivery of goods, wares and merchandise, the sum of ten dollars.' The reasons assigned for reversing the judgment * * * are, first, that it is not an ordinance for the regulation of the subjects of which it treats, but one for their taxation when no power is conferred upon the corporation to impose such tax. * * * Authority under a charter to pass by-laws and ordin-

ances to license, control, regulate, or prohibit a business or traffic, within a municipality, gives no power to *impose a tax for revenue purposes*. (Citing *Freeholders of Essex v. Barber*, 2 Halst., 64, and *North Hudson Co. Ry. v. Hoboken*, 12 Vroom, 71). * * * When the grant is not made for revenue, but for regulation merely, a fee for license may be exacted, but it should not exceed the necessary or proper expense of issuing the license. * * * It may not be easy, in every case, to determine with precision, from the amount of the fee charged, whether it is intended as a regulation or a tax, and all reasonable intendment should be in favor of its fairness and justness as a fee. * * * Again it may be asked why should the use of each *additional wagon* by him so *licensed*, call for an *additional license* fee? It could not be charged for the use of the public streets; that would be a road tax, imposed not in a manner authorized by law. * * * It is difficult to escape the conclusion, I think, drawn from the whole tenor of this part of the ordinance, that its purpose is to tax these occupations for the benefit of the treasury. It is irreconcilable with any other theory. By-laws or rules directing the manner of using the public streets by such persons, prohibiting the use of horns, or bells in the public streets, or the public outcry of vendors, and restrictions of like character, are properly regulations. And when authority is given to require the possession of a license, as a condition for selling, a reasonable fee, to cover probable expenses, can be demanded. *But the exaction of sums in excess of such expenses, and graduated by the amount of business done*, can be nothing else than a tax upon such business. I think this ordinance, so far as it affects the prosecutor and those of his class, is void, as one having for its leading purpose taxation for revenue."

It should be noted here that by section 32 of the ordinance of the city of Richmond under question, it is provided that there shall be paid to the city treasurer the sum of \$2.00 per wire per mile so owned or used by said person or company within the conduits.

The Supreme Court of New Jersey held that the license could not be graduated according to the number of wagons used in the particular case then under consideration, or by the amount of business done. How, then, can the city claim the right in the case at bar to demand a payment of \$2.00 per wire per mile; nothing could more clearly be a tax upon the amount

of business done by the telegraph company, and clearly within the principles enunciated by the Supreme Court of New Jersey in the foregoing case.

To the same effect is the case of *Van Hook vs. City of Selma*, 70 Ala., 361, *Fort Smith vs. Ayers*, 43 Ark., 82.

In the case of *City of New Haven vs. New Haven Water Company*, 44 Conn., 106, the Supreme Court of Connecticut had before it an ordinance of the town of New Haven requiring the water company to pay \$1 for a license to open an unpaved street, \$10 for every nine hundred feet of pipe laid, and \$50 for opening any paved street.

In holding this ordinance void, the following language appears in the opinion :

"The right, therefore, conferred upon the city is one of regulation merely. Under this the power in the matter of fees for licenses is thus spoken of in the case *Welch v. Hotchkiss*, 39 Conn., 143. The court says: 'Whenever a municipal corporation is authorized to make by-laws relative to a given subject, and to require of those who desire to do any act or transact any business pertaining thereto to obtain a license therefor, the reasonable cost of granting such licenses may be properly charged to the persons procuring them, although the power to do so is not expressly given in the charter.' Clearly the fees required of the company in the ordinance before us cannot be brought within that decision. The cost of issuing a license can be no greater for eighteen hundred feet of pipe than for nine hundred, and yet the fee is doubled; the cost can be no greater for a paved than for an unpaved street, and yet the cost is raised from \$1 to \$50. The magnitude of these fees and the *graduated principle* upon which they are established force us to declare that they are not designed for the sole purpose of paying the cost of the licenses. While in form the name license fees they become in reality an irregular assessment of taxes for revenue."

In analogy to the principles of the foregoing case, the placing of a cable containing one or a dozen or any greater number of wires within the conduit can require no more work in the issuing of a license therefor, or in the inspection thereof, than if only one wire were placed therein, and in the ordinance in question we have the identical graduation of fees which was the leading reason causing the Connecticut Supreme Court to hold the ordinance void.

The decision in the case of *City of Jackson vs. Newman*, 59 Miss., 385, can best be covered by the quotation from the syllabus, which is as follows :

"The exaction of forty dollars a year for the privilege of hack driving in a city, not being for the expense of labor and material in issuing the driver's license, cannot be sustained under the police power, which is inapplicable to revenue purposes, and from which the power to tax, which only exists as clearly granted, cannot be implied."

The case of *Joshua Vansant, Comptroller of the City of Baltimore vs. The Harlem Stage Co. of Baltimore*, 59 Md., 330, holds void a city ordinance requiring the owners of passenger omnibuses to pay for every such omnibus used for hire within the city limits, seventy-five dollars for the original license, and fifty dollars for the annual renewal thereof. On page 335, the court says :

"It is true that the power to license and regulate, carries with it, by necessary implication, the power to levy some tax. But in such cases the tax is a mere incident to the main purpose of the law. It is only intended as a means provided for carrying the law into effect.

"It is the bill of costs attendant upon the expense, trouble and labor of licensing and supervising. 'A right to license and its employment,' says Judge COOLEY, in his work on Con. Lim., 201, 'does not imply a right to charge a license fee therefor, with a view to revenue, unless such seems to be the manifest purpose of the power; but the authority of the corporation will be limited to such a charge for the license, as will cover the necessary expenses of issuing it, and the additional labor of officers and other expenses thereby imposed. A license is issued under the police power; but the exaction of a license fee, with a view to revenue would be the exercise of the power of taxation; and the charter must plainly show an intent to confer that power, or the municipal corporation cannot assume it.'

"The distinction between the power of taxation and the usual police powers, which are granted for the maintenance of peace and order, in a city is well settled. The functions of the latter are not primarily the raising of revenue. Incidentally, the treasury may be benefited by the license fees, where the power is specially to

license. But in all such cases the court must see, that the requirement of fees for the exercise of privileges is a *reasonable* exercise of the power of legislation granted the corporation. If under the guise of licensing and regulating, the municipal corporation should attempt to raise revenue, or clearly violate the rule requiring a reasonable exercise of its powers, the Courts will declare such ordinance unlawful and void."

The following is quoted from the opinion in *City of Ottumwa vs. Zekind*, 64 N. W., 646, decided by the Supreme Court of Iowa in 1895 :

"A license must be distinguished from a tax. The power to tax is one of the highest attributes of sovereignty, and, if delegated by the legislature to the municipality, such delegation must be in express terms, or by necessary implication, and cannot be implied from such general authority of power as 'to license and regulate' (*City of Burlington v. Putnam Ins. Co.*, 31 Iowa, 103; *State v. Herod*, 29 Iowa, 123; *City of Burlington v. Bumgardner*, 42 Iowa, 673; *State v. Smith*, 31 Iowa, 493; *Cooley, Tax'n.* (1st Ed.), p. 387; *Clark v. Davenport*, 14 Iowa, 494; *City of Davenport v. Mississippi & M. R. Co.*, 12 Iowa, 539; *Dill. Mun. Corp.* (4th Ed.), secs. 357-358; 13 Am. & Eng. Enc. of Law, p. 532. The municipality, under the authority given it to license, had the right to impose such a charge as would cover, not only the necessary expense of issuing it, but also the additional labor of officers and other expenses imposed by the business, but *nothing beyond this*. As said in the *City of Burlington v. Putnam Ins. Co.*, *supra*, 'Licenses are a part of the police regulations of a city, and should be charged for as such, and only to such extent as *may reasonably compensate the city for issuing and enforcing the license, and for the care exercised by the city under its police authority over the particular person licensed.*'

The amount of the license fee or charge is to be considered, in determining whether the exaction is not really one of revenue or prohibition, instead of one of regulation under the police power."

The same principle is laid down by the Appellate Division of the Supreme Court of New York, in the case of *City of New York v. Alexander, Hexamer*, 59 App. Div., 4. The following is from the syllabus :

"Section 49 of the Greater New York Charter (Laws of 1897, chap. 378) authorizing the municipal assembly to make ordinances 'in relation to the licensing and business of hackmen and to fixing the license, if any therefor' and 'To regulate the rates of fare to be taken by owners or drivers of hackney coaches or carriages; such owners shall pay an annual license fee to be determined by the municipal assembly,' does not authorize the passage of an ordinance imposing a license fee sufficiently large to constitute a tax, *independently of the cost of issuing and recording the license* or of any police control over the matter regulated, upon a person engaged in conducting a livery stable in the state of New Jersey, who at intervals sends his carriages into New York City for the sole purpose of meeting the steamers of a transatlantic line and conveying the passengers to their respective destinations."

The Supreme Court of Errors of Connecticut, in *State vs. Glavin*, 34 Atlantic Rep., 708, cites and follows the decisions of *Welch vs. Hotchkiss*, 39 Conn., 143, and *City of New Haven vs. New Haven Water Co.*, 44 Conn., 108 (*supra*).

In *Chaddock*, President of the Village of Allegan *vs. Day*, Justice of the Peace, 42 N. W., 977, the Supreme Court of Michigan, after holding that a license fee of \$10 per month for permission to sell fresh meats in the streets, was invalid as an exercise of the police power, decided also that, in the absence of any market regulations in the village, the fee was unreasonable and void, even if its charter authorized the exacting of a license fee.

It will be seen from the foregoing authorities that it is the rule that the exercise of the police power must in all cases be limited to the protection of the life, health and morals of the citizens, and that even where the clear power is given to a municipality to require the obtaining of licenses for certain purposes, the fees which it is permitted to charge therefor must, in all cases, be limited to the necessities of the police power, *i. e.* the issuing of the licenses in question, and the expenses necessarily incurred in connection with their issuance, recording and supervision.

As has heretofore been pointed out, the testimony in the case is clear that no such charge as is here attempted to be made could possibly be required for supervision, and to say that such an amount is necessary for the purposes of defraying

the expense of the granting and recording of the licenses is, unworthy of consideration. On the contrary, we are confronted on every hand with clear evidence that these charges are sought to be made purely as measures for collecting revenue for the city and as a punishment against the telegraph company for endeavoring to protect its rights.

Of course, what we have said heretofore with respect to the right of the city to require the reservation of space upon poles for overhead wires applies with even greater force to the right of the city to compel the company, in placing its wires underground, to furnish all the material and construct this expensive work and set apart at least one duct for the use of the city free of charge therefor.

FOURTH.

The ordinance respecting underground wires requires the company to construct property which may be available for others to use, and which it is not permitted to use without the consent of the city, and which may never be used.

Sections 27 and 28 of the ordinance relate primarily to the removal of wires from overhead poles and placing them underneath the surface of the streets. Section 27 defines the limits of the territory within which such removal shall take place, and impose a fine of not less than \$100 nor more than \$500 for each pole remaining within this underground territory, after a certain date and every week of continued failure is an additional offense.

Section 28, as amended December 18, 1903, provides as follows :

“That all telegraph, telephone and electric light and power wires and cables, including feed (but excluding trolley wires), and all other appliances for conducting electricity, shall be removed from the streets, alleys and public grounds of the city of Richmond

within the territory mentioned in the foregoing section within six months after the passage of this ordinance, and every individual, partnership, corporation or company owning such wires within said territory shall within two months after the passage of this ordinance submit to the Committee on Streets and Shockoe Creek plans and details showing the location, plan, size, construction and material of such conduits. Such plans may be altered or amended by said committee, and when satisfactory to it shall be approved, and thereupon it shall be the duty of the owner of such wires to proceed with the construction of such conduits in accordance with the plans so approved, and in a manner satisfactory to the City Engineer. The pavement of the streets and alleys wherein such conduits are laid shall be properly replaced, and shall be kept in proper repair to the satisfaction of the City Engineer, and the city shall be saved harmless from any and all damages arising from laying such conduits. Such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys, and shall provide for an increase thereof to at least the extent of 30 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership or individual directly or indirectly, without the consent of the Committee on Streets and Shockoe Creek, but the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires. After obtaining the consent of the Committee on Streets and Shockoe Creek, any other person or corporation now having wires in the streets, or hereafter desiring to run wires therein, may occupy necessary and proper portions of such conduits upon such terms as may be agreed upon with the petitioner; and in case of a disagreement, upon terms to be determined by arbitration, as herewith provided; any such company, corporation, partnership or individual so placing its wires under ground in any street, alley or public ground of said city shall, upon notice from the city or any of its departments, that a local improvement of gas, sewer or water main, or branch thereof, is to be constructed or repaired in such manner as will necessitate the moving or altering of its conduit or conduits, or their appurtenances, of said individual, partnership, or company or corporation, move or alter the same at its own expense so as to permit the construction of the improvement where ordered, and should any company or corporation omit to comply with such notice, the conduit or con-

duits, or their appurtenances, may be altered or moved by the city, and the cost and expense thereof recovered from such individual, company or corporation. Man-holes shall at all times conform to the grades of the streets. The location, size, shape and subdivision of such conduits, and the material of which they shall be made and the manner of construction, shall be satisfactory to the city engineer. The work of laying underground conduits, tubes, pipes, electrical conductors, cables and wires, shall be under the direction and to the satisfaction of the Superintendent of Fire Alarm and Police Telegraph, who shall at all times have free and unobstructed access to the conduits, tubes, pipes, electrical conductors or cables, for the purpose of inspecting the same or making connection therewith for conduit wires or conductors in use or to be used by the city."

The language of the section with respect to the extent of construction by any owner of wires is ambiguous, and does not clearly indicate whether in submitting plans for the construction of the conduit the plans shall cover the wires of the particular owner or all the wires in the street, but, assuming that each person submitting plans, only plans for the construction of conduits to cover his own wires, we then have a situation that the person submitting plans must not only submit plans to accommodate all the wires in such streets and alleys owned by him, but an increase of such amount to the extent of at least 30 per cent., and, in addition to this there is also the requirement that at least one duct be reserved for the use of the city's wires.

It will be observed that no discretion is given to the owner of the wires with respect to this matter; the rule is laid down regardless of what its plans may be with respect to the future increase of wire capacity in those streets; this surplus capacity is required even though its plans may be such as to call for no increase of wire capacity there because it has made or is making abundant provisions elsewhere for such increase of capacity, and it is required to make this increase in capacity in order to get the "permission" of the city to the construction on these particular streets.

And further,—the ordinance provides that such increase of space is not to be occupied by such person, corporation, partnership or individual without the consent of the Com-

mittee on Streets and Shockee Creek; in other words, the telegraph company which has the right to maintain its wires along any of the streets of the city of Richmond under the Act of Congress, under the simple condition that it shall not interfere with the ordinary travel thereon, in order to get a permit to place its wires within certain streets thus already granted to it by the Act of Congress, is compelled to expend a large sum of money to secure facilities which, when completed, it is not permitted to occupy itself without the permission of the city authorities. It will be observed that this is not the case of a general conduit system which is constructed by the city or by a company licensed to occupy the streets for that purpose, and to be occupied by the persons owning and using wires, but it is a question of the right of the city to compel one person to provide facilities for another.

As shown by the testimony one duct would accommodate all the wires of the telegraph company that would be required to be used in the city of Richmond when placed in a cable. But the testimony also is that in order to avoid interference with the operations of the telegraph arising because of the cable in one duct becoming disabled, it is the part of prudence, in laying a subway of this character, to lay a second duct which is to be kept free and clear and into which a spare cable could be run at any time, thus reducing the time of interruption to traffic to the minimum. The telegraph company would be required, therefore, in the prudent conduct of its business to lay two ducts for its own purposes. One duct would be required by the ordinance for the use of the city and one duct for the 30 per cent. increase called for in the ordinance. The requirements for the city's accommodation and the surplus duct therefore would require two extra ducts and thus double the expense of the conduit construction to the telegraph company under the provisions of this ordinance over what would be required for its own necessities in placing its wires underneath the surface of the streets of the city.

It will be observed that while the sections of the ordinance provide that anyone who wishes to run wires into this surplus duct may occupy the space therein upon terms which may be agreed upon or arrived at by arbitration, there is no assurance whatever that any such customer will ever apply for this spare

space. The capacity of each of the ducts is described by the witnesses as from 150 to 200 wires when placed in cables. It is highly improbable that the telegraph company's business would ever increase to such an extent in the City of Richmond as to require all the space it is thus required to provide under this section of the ordinance, but even were it remotely possible that such a condition should ever exist, it is entirely dependent upon the Committee of Streets as to whether it would be permitted to avail itself of it. This, we submit, is a wholly unreasonable requirement. The answer to this, on the part of the city, as we understand it, is that the construction of the additional duct amounts to scarcely anything in the way of expense or capital invested, because, when the excavation is made, it is easy to lay these additional pipes, and the expense is a small matter. In one of the cases cited above from New Jersey, five cents was held to be an illegal charge, and, therefore, rendered void, the ordinance imposing it. The amount of the expenditure required is not a test of the legality of the ordinance requiring it. The amount is not small when we come to consider that the city of Richmond is only one of many cities and municipalities which may require the substitution of conduits for overhead wires, and the multiplication of expense which may be exacted from the telegraph company all over the country by requirements of this kind, if this were held reasonable, it will be seen it is not at all a matter to be despised. The testimony in the case with respect to the increased cost is that the construction of the conduit to accommodate the lines of the Western Union Telegraph Company with two steel ducts would be about \$16,500 within the underground territory, and to provide the additional ducts would require an additional expense of \$9,000.

FIFTH.

The ordinance imposes illegal conditions, restrictions, expenses and burdens as conditions of the right to use the streets of the City of Richmond, which right is secured to the telegraph company by an act of Congress, subject only to the compliance with reasonable police regulations for the protection and convenience of the inhabitants of the city.

By section 32 of the ordinance it is provided that :

" For the privilege of using and occupying the streets of the city, as herein proposed, each person or corporation owning or using any wire or wires run in such conduit shall each year, until January 1st, 1900, pay to the city treasurer a sum equal to \$2 per wire, per mile, so owned or used by said person or company. On and after January 1st, 1900, the City Council reserves the right to charge such larger compensation for the rest of the term of the privilege as it may see fit."

Under section 28, as we interpret its provisions, the conduit is required to occupy space under the streets unoccupied for any other purpose. There is the provision that whenever any local improvement of gas, sewer or water main, or branch thereof is to be constructed or repaired in such manner as will necessitate the moving or altering of the conduits, the same shall be moved at the expense of the corporation owning the same. It is clear, therefore, that upon the theory of a rental, this exaction cannot be maintained, for there is no basis upon which it can be said that this charge for the occupation of the space beneath the streets, with no injury to the surface of the streets, is a reasonable charge or compensation for the space occupied by the conduit under the principles of the decision of Western Union Telegraph Company vs. St. Louis. In any event the provision that after January 1, 1900, the city council has the right to charge such larger compensation than \$2 per mile of wire as it sees fit is

entirely beyond the principles of that decision and contrary to them.

Upon the question of inspection and the expense thereof the testimony is clear that within these underground limits, with manholes placed by the telegraph company at each block, the total cost of inspection in order to ascertain that the conduits are maintained in a safe and proper condition would be practically nothing. The charge of \$2.00 per mile, therefore cannot be maintained upon the pretext of the expense of inspection, because no such expense would be incurred by the city. In the court below an attempt was made to sustain this charge upon the theory of the cases of *Western Union Telegraph Company vs. New Hope*, 187 U. S., 419; *Atlantic & Pacific Tel. Co. vs. Philadelphia*, 190 U. S., 161, and *Postal Telegraph Cable Co. vs. New Hope*, 192 U. S., 55.

We do not believe that these cases, when analyzed, sustain the contentions of the city in this respect.

In the first case an ordinance of the borough of New Hope imposed an annual license fee of \$1.00 per pole and \$2.50 per mile of wire on the telegraph, telephone and electric light poles within the limits of the borough. This was held not to be a tax on the property but a charge in the enforcement of local governmental supervision, and the ordinance imposing such fee was required to be taken as *prima facie* reasonable. This court followed the decision of the Supreme Court of Pennsylvania to the effect that the fact that the borough or city did not expend money for inspection, supervision or police surveillance of the poles and wires in any particular year was not a defense, and that the unreasonableness of the fee must be clearly apparent. That is the extent of that decision.

The case of *Atlantic and Pacific Telegraph Co. vs. Philadelphia* came to this court from the Circuit Court of the United States for the Eastern District of Pennsylvania, and the question presented was as to the reasonableness of certain charges imposed by ordinance of the city of Philadelphia upon the Atlantic and Pacific Telegraph Company when engaged in interstate commerce. It was held that the charge sought to be collected was not a tax upon the property but was a charge for the enforcement of local governmental supervision such as was presented in *Western Union Telegraph Co. vs. New Hope*. The effect of this decision is

that the municipality is not without limitation in the amount of the charge which it can exact for such governmental supervision and that the amount of the actual expense of such police supervision determines the amount of the charge, and if it were possible to determine that with exactness that would be the limit of the exaction. Upon the trial the court instructed the jury to find for the plaintiff the full amount claimed, thus taking the question away from the jury with respect to the reasonableness of the charge in the light of all the circumstances of the case, and this court held that it was proper that the question of the reasonableness of charges under the testimony adduced should be submitted to the jury, and the judgment was reversed, with instructions to grant a new trial for this error on the part of the trial court.

In *Postal Telegraph-Cable Company vs. New Hope* the same ordinance was under consideration as in the case of *Western Union Tel. Co. vs. New Hope*, above noticed. The question was submitted to the jury as to the reasonableness of the amount fixed by the ordinance, which found a verdict for a less sum as the expense of police supervision than that named in the ordinance. This was affirmed by the Supreme Court of Pennsylvania, from which an appeal was taken to this court, where it was held that this finding by the jury amounted to a finding that the amount fixed by the ordinance was unreasonable, and if unreasonable, it was illegal and void, and the case was remanded for proceedings consistent with the opinion.

In this case, under the testimony, we have a state of facts precisely like that presented in the *Postal Telegraph-Cable* case, where there is an ordinance fixing a certain sum, with a right reserved to increase such fees, and the testimony very conclusively shows that for police surveillance no such sum would be required.

It is to be observed that in neither of these cases is the exaction of \$1.00 per pole and \$1.50 per mile of wire sought to be sustained upon the theory of rental announced in *Western Union Telegraph Company vs. St. Louis*, but solely upon the theory of governmental supervision, and to that extent alone is it admitted to be justified.

SIXTH.

The ordinance seeks to put limits upon the right of the Telegraph Company to use the streets, and to require the abandonment of the use of the streets at the demand of the City, while the Act of Congress secures to the Telegraph Company the full and unlimited right to use the streets subject only to fair and reasonable regulations by the City.

Section 31 of the ordinance provides as follows :

“ No privilege as to the building and owning of said conduits shall last longer than fifteen years, at the expiration of which time the city may put such restrictions, conditions and charges as it may see fit, and shall be lawful, or may order its removal at the expense of the owner.”

in contrast with the Act of Congress that the telegraph company shall have the right to construct, maintain and operate lines of telegraph * * * over and along any of the military or post roads of the United States, * * * provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.”

It is very evident that there is a radical difference between the rights granted the telegraph company under that Act of Congress and the provisions of section 31 of the ordinance of the City of Richmond above quoted ; the first proceeds upon the theory that the telegraph company has the right, unlimited in duration, to construct, maintain and operate its telegraph lines, subject, always, to the one proviso, that it shall not so construct and maintain its lines as to interfere with the ordinary travel on the streets, but, subject to that proviso with respect to police regulations, and to that proviso alone, it has the right to continue to maintain its lines and to operate them free from any interference by the city or its officials. Pensacola

Tel. Co. vs. W. U. T. Co., 96 U. S., 1; St. Louis vs. W. U. T. Co., 148 U. S., 92; Leloup vs. Port of Mobile, 127 U. S., 640, and cases there cited.

Section 31 of the ordinance is drawn upon the theory that the right to construct and maintain lines of telegraph upon the streets of the city of Richmond, and the right to lay conduits to carry such wires is dependent upon the consent of the city, and that the city may at any time withdraw such consent and compel the removal of such lines. This we contest as fundamentally wrong with respect to the rights secured to the telegraph company by the Act of Congress of July 24, 1866.

Concluding Observations.

In the brief in the court below the city attorney thus stated his views of the fundamental question in the case :

"The initial question in the discussion of this case on its merits is whether the city of Richmond is invested with power to control the highways within its territorial limits, so as to determine the manner and extent of their use by persons whose business, to be effective, must appropriate a part of the highway to such use by placing structures more or less permanent therein.

"That this question must be answered in the affirmative, I submit with confidence."

The conception underlying the statements in the foregoing paragraphs, it is evident, has been the controlling motive in the preparation and enactment of the ordinance, the provisions of which we have presented for the consideration of this court.

The evident design of the preparation and passage of the ordinance was to compel the Telegraph and Telephone Companies affected by it, to submit absolutely to the control of the city within the limits of the city; that is manifest from an examination of practically every section of the ordinance, and the question which we now present is, can the city thus limit and control the operations of the telegraph company engaged in interstate commerce, an

agency of the federal government, and compel it to submit in all essentials, to the terms the City has set forth in this ordinance the same as the City of Richmond has compelled the Southern Bell Telephone Company to submit to it, the latter company not being invested with any of the rights conferred by the Act of Congress of July 24, 1866 ?

Take the provisions of the various sections of the ordinance giving the city officials the right to determine as to all matters respecting poles, the attachment of wires thereto and apparatus connected therewith, and making their discretion the rule of conduct for the telegraph company ; consider the fact that this company is engaged in interstate commerce and is an agency of the federal government and if it is compelled to adjust all these matters thus left to the arbitrary discretion of the city engineer or other city officials within the city of Richmond as they decide, and what follows ? If this rule is applied, each municipality has the right to require something different from the Telegraph Company, something which in the judgment of the officials of such municipality is best for the operation of the lines within its limits. In this case we call attention to the fact that responsible telegraph officials testified that for the purposes of the telegraph company a conduit constructed of steel pipe was best adapted to its needs, whereas the city engineer of Richmond testified that clay conduit was in his opinion the one which was very much better. It is clear from his testimony that he would require such construction in plans for the conduit. His view would consider the needs of the City of Richmond alone, although he has had no experience as to the needs of a telegraph system covering the whole country and operating long distance lines.

When we recall, also, that such underground construction may be required in many places on long circuits such as from Washington to New Orleans, and that each underground piece of construction is a serious obstacle to the rapid transmission of messages, it will be understood why it is desirable that there should be uniformity and that the methods of construction and operation which the responsible officials of the telegraph company have found to be most efficient for its purposes should be free for them to adopt rather than that they should be found to accept the judgment of a local municipal officer. The judgment of the officers of the Telegraph Company has

been acquired in long years of active personal experience; if this ordinance should be held reasonable and capable of enforcement to its full extent within the city of Richmond, the result would be to largely take from the officials the telegraph company the control of its business and place an important part of the operations thereof, to wit, the character of construction, maintenance and facilities for the performance of its business, largely in the control of the municipal officers of the city of Richmond and other like municipal officers and away from the control of the officers of the telegraph company charged with the responsibility to the public therefor. Such a result is very much to be deprecated, for what Richmond may do other municipalities may do and uniformity of construction, and equipment so essential to the highest success in operation will be rendered impossible.

The effect of this ordinance is very carefully considered by SIMONTON, J., in the case of *City of Richmond vs. Southern Bell Telephone & Telegraph Co.*, 85 Federal Reporter, at page 86, where, after considering the rights of the telephone company under the Act of Congress, and deciding that it was entitled to the benefit of the provisions of that act, he says:

"The only remaining question is, do the ordinances of the city of Richmond prescribe regulations which make the use burdensome and intolerable, and practically impossible? 'It belongs to the legislature to exercise the police power of the state, subject to the power of the courts to adjudge whether any particular law is an invasion to rights secured by the Constitution.' *Mugler v. Kansas*, 123 U. S., 632. 'The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business of, or impose unusual and unnecessary restrictions upon, lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts.' *Lawton v. Steele*, 152 U. S., 137. If this be the case with regard to the legislature *a fortiori* it applies to a municipal corporation, the creature of the legislature. On examination of these ordinances it will be seen that, as a condition precedent to the use of the streets of Richmond, a petition must first be filed for the purpose of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of that ordinance, and such other condi-

tions as the council may see fit to impose. Ordinance approved 10 September, 1895. The seventh section of this ordinance expressly reserves to the city council the right to put at any time other restrictions and regulations. And the whole tenor and effect of the ordinance is to put the company absolutely under the control of the city. And the terms of the ordinance are enforceable under heavy penalties. The next ordinance,—the one providing for wires and conduits,—after providing that the city council may compel the removal of wires from poles overhead in certain streets, and the putting them in conduits in certain streets, under a penalty of not less than \$100. or more than \$500. for each pole per week, provision is made for permission to build conduits of sufficient capacity to accommodate the wires in such streets, and to provide for the increase thereof to at least the extent of 100 per cent., the increase of space not to be occupied by the party building the conduits without the consent of the council, the conduit to be used for the wires of the council free, and the city council to allow any other person or corporation to use such conduit for wires upon paying compensation in the mode prescribed by the city council; this privilege of building and owning conduits to last no longer than 15 years, at the end of which time the city may put such other restrictions, conditions and charges as it may see fit, or may order their removal at the expense of the owner. The charges for using or owning any wire in any such conduit shall be for each year until January 1, 1900, two dollars per wire per mile; after January 1, 1900, such larger compensation for the rest of the term as the city council may see fit. These are some of the conditions now imposed, with the right to impose any others which the council may see fit. Now, it goes without saying that if the complainant, notwithstanding its claim of protection under the act of congress of 1866, were willing to file a petition to the city council for the privilege of using its streets and alleys, and in that position, agreed, in consideration of its grant, to abide by any present or future condition, regulation, or restriction the council may impose this would be a binding contract, and would control the complainant. *Ashley v. Ryan*, 153 U. S., 436. Whatever the rights of the complainant may have been under such a stipulation, it would surrender them, and come within the absolute dominion of the city council. The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the

complainant would be bound by its contract to obey the ordinance, be it a police regulation or not. These conditions, regulations, and restrictions already prescribed by the city council, appear to be stimulated by a desire to oppress and control, perhaps defeat the existence of the complainant, and so are not the lawful exercise of the police power."

Chapter 88 of the ordinances of the City of Richmond embody the ordinances referred to by Judge SIMONTON. In section 28, instead of the 100 per cent. increase provided for by the conduit provision, the amendment of December 10, 1903, substitutes an increase of 30 per cent., but in all other respects chapter 88 of the ordinances of the City of Richmond is identical with the several ordinances which Judge SIMONTON had under consideration. These ordinances have been consolidated in chapter 88.

The city of Richmond, after the suit was instituted and the injunction obtained, and on the 16th day of December, 1905, passed an ordinance to amend chapter 88 by adding a new section thereto, section 34, reading as follows :

"None of the obligations, burdens or restrictions of this chapter shall in any manner interfere with or destroy the rights and privileges secured to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866."

How this in any way modifies or renders less unreasonable the provisions of section 28, for instance, or the other sections in question, we are totally unable to understand.

Under section 28, the telegraph company would still be required, notwithstanding this section 34, to file a petition setting forth plan and maps; the committee of the city council would take the same action and the telegraph company would be compelled to proceed just the same as if section 34 had never been enacted. The city officials have the same arbitrary discretion in the particulars to which the attention of the Court has been called.

The only effect of section 34 which we can conceive of is that the city might be unable thereunder to claim that action taken under it by the telegraph company in the way of filing plans, etc., would create an es-

toppel or amount to a contract which would prevent the company from afterwards claiming the privileges or benefits secured to it by the Act of Congress. It, however, leaves the question of the reasonableness of the conditions just the same as before the passage of the additional section, and the conditions remain as unreasonable, as unjust and as open to attack since the passage of section 34 as before.

Mr. Justice Goff, in the Circuit Court, in passing upon sections 27 and 28, says :

“ Sections twenty-seven and twenty-eight, as originally enacted and as amended, are alleged by complainant to be specially burdensome, illegal, unconstitutional and unreasonably restrictive of its rights, grants and privileges. They determine and describe the limits of the ‘underground district’ and require all poles and wires in use therein to be removed therefrom, except trolley wires. They authorize any company to place its wires in conduits under the surface of the streets of the city after application has been duly made by it for that purpose, in which the streets to be so used are to be named, and a map locating the conduits, with plans and details concerning them to be filed therewith. The permission to use the streets is then to be granted by the city council, under the conditions and regulations heretofore referred to. I think the complainant is shown by the record to be unreasonably apprehensive of the result that will follow the enforcement of these sections. Their provisions apply to all alike, are not peculiar to the city of Richmond, but are found in the enactments of most of the cities of the United States. At one time not necessary they are now absolutely essential, and not only is the convenience and safety of the public subserved by them, but also do they protect the interests and facilitate the business of the complainant. It is to be regretted that their enforcement will cause trouble and expense to the complainant, as it will also to the defendant, but there is no reason why they should not be respected, nor does that make them unreasonably burdensome.”

It is evident that the learned court has wholly missed the point of the objections which the complainant makes to these sections. The part quoted, and other parts of the opinion in connection therewith indicate that the learned court supposed that complainant was objecting to these sections because they

created an underground district and required the wires to be placed beneath the surface of the streets within that district. A careful reading by the court of the amended bill would have disclosed that that is not the position of the complainant, because by section 26 of the amended bill of complaint, the right of the city to impose reasonable regulation in this particular is fully conceded in the following language:

"Your orator says further that it recognizes the right of the said city to impose reasonable regulations for the construction, maintenance and operation of telegraph lines within said city, and in recognition of said right your orator has, within the territory set forth or described in section 27 of said chapter 88, offered to the proper committee of the counsel of said city, and hereby repeats the offer, to place its wires underground within said territory, if said city will waive the illegal and unconstitutional requirements of said chapter 88 hereinbefore set forth, but your orator avers that said city of Richmond refuses to modify the said chapter 88 by the removal therefrom of said illegal requirements or to make express reservation and preservation of the rights of your orator the said Act of Congress of July 24, 1866" (Rec., p. 102).

The offer thus made in section 26 of the amended bill is admitted by the answer.

It is not, therefore, as the Circuit Court erroneously interpreted, the objection of complainant to its wires going underground, but it is that if it files the petition and proceeds with the construction of the conduits within the underground district, it would have to comply with all the provisions of section 28 which are illegal, and if the city insisted upon the illegal conditions in the construction which it has pointed out, it would be in exactly the same position it now finds itself—compelled to appeal to the court to have certain provisions in that section declared illegal and unreasonable and therefore void.

The decree of the Circuit Court dismissed both the original and amended bills. This amounted to a declaration by the Circuit Court that there was no merit in the complainant's bill or amended bill so far as it challenged any section whatever of section 88 of the Ordinances of the City of Richmond.

It may be possible that some of the sections which are attacked may be considered by this court within the limit of the city's power, but some of the sections are so clearly beyond the limits of legitimate regulation that the bill and amended bill of the complainant attacking such sections should have been sustained by the Circuit Court. The Circuit Court does not undertake to discriminate, but with a sweeping decree wipes out the entire bill and amended bill.

Complainant therefore insists that it should have been granted the injunction for which it asked, restraining the city of Richmond from enforcing the illegal and unreasonable provisions of chapter 88 or the penalties attaching to complainant because of its refusal to comply with these illegal requirements.

The decree of the Circuit Court should be reversed, with directions to that Court to award the relief prayed for by the complainant.

Respectfully,

RUSH TAGGART,
A. L. HOLLADAY.

MAR 4 1911
JAMES H. MCKENNEY

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 105.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

vs.

THE CITY OF RICHMOND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA.

REPLY BRIEF ON BEHALF OF THE WESTERN
UNION TELEGRAPH COMPANY, APPELLANT.

RUSH TAGGART,
A. L. HOLLADAY,

Attorneys for Appellant.

Supreme Court of the United States,

OCTOBER TERM, 1911.

THE WESTERN UNION TELEGRAPH
COMPANY,
Appellant,

vs.

THE CITY OF RICHMOND,
Appellee.

No. 195.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

APPELLANT'S BRIEF IN REPLY.

Much that is said in the brief of appellee is, as we view the contentions of the parties, immaterial and irrelevant. It is somewhat difficult to understand exactly the basis upon which appellee seeks in this case to plant its defense to the contention of the appellant that the ordinance is unreasonable and consequently invalid.

In the second paragraph of the brief the case of the appellee seems to be planted upon the position that the ordinance granting the American Union Telegraph Company permission to erect telegraph poles and run wires along certain streets amounted to a contract with the city by the American Union Telegraph Company. The Western Union Telegraph Company,

in 1867, accepted the Act of Congress of July 24, 1866, and subsequently, in 1881, under the laws of the state of New York, entered into a valid consolidation with the American Union Telegraph Company. It must be the claim of the appellee that thereby it became so bound by the provisions of the ordinance of the City of Richmond permitting the American Union Telegraph Company to put its lines upon the streets that it is now estopped from setting up the rights which it claims under the Act of Congress.

We come, then, to a consideration of the effect of the ordinances enacted by the city respecting the American Union Telegraph Company, and which are reproduced in the brief of appellee at pages 6 and 7.

First.

The first answer to the contention of appellee in this matter is that there is nothing in these ordinances enacted in 1881, even if they had the effect of creating a contract with the Western Union Telegraph Company, which in any way limits or restricts the Western Union Telegraph Company in making the claim which it now makes with respect to the new and different ordinance enacted in 1895, and now constituting chapter 88 of the ordinances of the city of Richmond. Section 60 of the ordinance of 1881 merely prohibits the erection of telegraph poles or posts on Main Street under prescribed penalties (Record, p. 132). Section 61 provides that the privilege of erecting poles and posts granted by ordinance of 1880 to the American Union Company shall be granted to Western Union Telegraph Company so far as is not inconsistent with Section 60 (Record, pp. 131-133). The subsequent resolution adopted by the Board of Aldermen December 12, 1881, and concurred in by the common council January 2d, 1882, define certain streets in which poles may be

erected, and provides that the privilege granted shall be revocable by two successively elected councils (Record, pp. 148, 149). This does not in any way constitute an agreement by the Western Union Telegraph Company that it will abide by and assent to any ordinance which the city of Richmond may adopt in 1895, or subsequently, no matter how unreasonable the same may be, and yet, in the brief, at page 38, that is the force and effect which is sought to be given to this last ordinance, and the case of Southern Bell Telephone and Telegraph Company against the City of Richmond, 98 Fed., 671, is cited as an authority for this position. The difference between the position of the Southern Bell Telephone and Telegraph Company as presented in that case and that of the Western Union is that the Southern Bell Company, under the decision of this court in 174 U. S., 778, was without the provisions of the Act of Congress of July 24, 1866, and was wholly dependent upon the consent of the city for the right or privilege of constructing and maintaining its lines within the limits of the city of Richmond. In the original proceedings in the case of the Southern Bell Company against the City of Richmond attacking this ordinance before the case reached this court or the Circuit Court of Appeals, the Circuit Court had not considered the rights of that company under the laws of Virginia and the ordinances of the City of Richmond. This Court, speaking through Mr. Justice HARLAN at the close of the opinion in that case (174 U. S., 671), says: "What rights the appellee had or has under the laws of Virginia and the ordinances of the City of Richmond is a question which the Circuit Court did not decide, but expressly waived. It is appropriate that that question should first be considered and determined by the court of original jurisdiction."

The case was accordingly remanded for that purpose. It was after that remand and under the clear decision of this court that the Southern Bell had absolutely no rights under the Act of Congress but

was dependent solely, therefore, for what rights it had, upon action of the City of Richmond, that Judge GOFF rendered the decision reported in 98 Fed., 671, and, when the case came to the Circuit Court of Appeals Judge SIMONTON considered the case solely as one where the telephone company had a consent to occupy the streets upon the terms and conditions named in an ordinance of the City which terms the telephone company had expressly accepted. His decision was expressly based upon the fact that the council of the city of Richmond had absolute power to grant or refuse to grant to the Southern Bell Telephone and Telegraph Company the privilege for which it asked, and the result was therefore reached that the Southern Bell Company was compelled to abide by and perform precisely the terms thus expressed by the city in its ordinance (103 Fed. Rep., 31). No such requirement, we submit, in any way attaches to the Western Union Telegraph Company in view of the provisions of the Act of Congress and the rights secured to it by that act. It is subject only to reasonable police regulations, but such regulations must be reasonable, and their reasonableness may be inquired into by this court.

Second.

In answer to the first point of appellant's brief, the appellee considers only the provisions of section 1 of the ordinance and quotes the conclusion of the circuit court to the effect that the requirements of section 1 do not deprive appellant of the right given it by the Act of Congress of July 24, 1866, although the appellants brief deals with many other sections of the ordinance.

Appellee's brief also quotes from and cites a number of authorities for the purpose of meeting the position contended for by appellant in its brief that the ordi-

nance does not impose definite rules for the guidance of the telegraph company in the operation of its business within the city but exposes the operations of the company to the arbitrary discretion of the officers of the city without any definite rules to guide the officers in the discharge of their duties.

In the main brief filed by appellant we have pointed out the features of the ordinance which infringe upon the rights of appellant in the particular above specified, which amply support the contention which we make, and we also cite a number of authorities from the state and Federal courts sustaining the rule that the subjection of the appellant to the exercise of this arbitrary discretion by the city officials creates an unreasonable requirement and that such an ordinance is void.

The definition as to what constitutes a proper as distinguished from an improper delegation of power under the authorities is perhaps not an easy one to make, but it is clear, that, with respect to this ordinance, it is not necessary that a close analysis of the authorities be made in order to discover the dividing line, because this ordinance goes so far beyond what is proper.

In the case of *United States vs. Grimaud*, 220 U. S., 506, Mr. Justice LAMAR, quoting from *Field vs. Clark*, 143 U. S., 694, laid down this rule with respect to the delegation of power :

“The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.”

In *Field vs. Clark*, 143 U. S., 693, Mr. Justice HARLAN, in drawing the line between a proper and an improper delegation of power, says :

“‘The true distinction’ as Judge RANNEY, speaking for the Supreme Court of Ohio has well said, ‘is between the delegation of power to make the law, which necessarily involves a discretion as to what it

shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made,' *Cincinnati, Wilmington, etc., Railroad, v. Commissioners*, 1 Ohio St. 88. In *Moers v. City of Reading*, 21 Penn. St. 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending upon the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So in *Locke's Appeal*, 72 Penn. St. 491, 498; 'To assert that a law is less than a law because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction, the court said, was this: 'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.'"

An application of the rule thus announced by this court will, we submit, show how completely the sections of this ordinance fall under the inhibitions of the principles set forth.

Let us take first section 1 referred to in appellee's brief. If this section defined the character of pole to be used, the height of the wires and character of apparatus, etc., etc., leaving the matter of the determination whether the telegraph company's poles, wires, apparatus, etc., complied with the requirements of the ordinance, no objection whatever could be made that it was an improper delegation of power; the ordinance in that case would make the law and it would delegate the power to determine a fact or a state of things showing conformity or non-conformity with this law.

If such were the ordinance no objection could be made to it on this ground. On the contrary, however, the section gives to the city engineer the power to *make the law* with respect to each of the subject matters therein named ; he is given power to determine the character of the poles ; he is given the power to determine the quality and appearance of the poles, the location of the poles and the height above the streets of the wires thereon ; in short, power is given to the city engineer to determine everything with respect to such poles, wires and apparatus *in the first place*, and such determination by the city engineer is final and conclusive upon the telegraph company. The law-making power which belongs to the city council in these particulars is confided to him, and such a delegation of power renders the ordinance in that respect unreasonable and void.

So, in connection with section 15, power is given the Chief of the Fire Department or the Superintendent of Fire Alarm and Police, Telegraph or either of them, to determine as to what constitutes suitable attachments, insulation, support or appliances. Here again these officers are not to ascertain the fact as to whether the telegraph company is conforming to laws enacted by the city council ; they are themselves to make the laws and their action is, by the ordinance, made final and conclusive upon the telegraph company.

Many of the authorities cited by appellee in its brief are of the character referred to by this court in the rule above quoted.

One relied upon and quoted from quite extensively by appellee may be taken as an example—that is the case of *Gundling vs. Chicago*, 177 U. S., 183, where an ordinance vested in the mayor the power to pass upon certain facts in connection with granting licenses for the sale of cigarettes. The ordinance of the city of Chicago in this case required that applicants for licenses should be persons of good character and reputation, and the mayor was given the power to determine this question before issuing the license.

All the conditions upon which the licenses would be issued were however definitely fixed in the ordinance itself. This was a clear case of a delegation to determine a fact or state of things within the rule laid down by this court; there was no delegation of legislative authority, but a mere executive discretion.

The case of *Missouri vs. Murphy*, 170 U. S., 78, and many of the other cases cited by appellee differ also, in another important particular from the case now before this court, and that is in the fact that those cases were brought to this court by writ of error from the state courts, and the only question presented for the determination of this court was the Federal question with respect to the violation of the constitutional rights of the person complaining. In the case of *Missouri vs. Murphy*, the Laclede Gas Light Company had a charter from the state to lay pipes in the streets of St. Louis. The city of St. Louis, in the exercise of its police powers, passed an ordinance requiring all persons to obtain permits from the Board of Public Improvement of that city for the doing of certain things in the streets. The Gas Company claimed that under its authority from the state it was not subject to this police regulation. This contention being denied by the Supreme Court of Missouri, it came to this court upon the Federal question claimed by it under its alleged contractual rights with the state. Of course, this court denied its contention, stating on page 100, that:

"It must be remembered that the case does not come before us from the Circuit Court. This is a writ of error to revise the judgment of the highest tribunal of a State, and this we cannot do unless Federal questions have been erroneously disposed of."

In the case at bar original jurisdiction was in the Circuit Court, and from the decision of that court the appeal is taken, bringing up every question which can be raised in the case.

Third.

With respect to the question of the imposition of excessive fines and penalties in the ordinances, the rule laid down by Mr. Justice PECKHAM in *ex parte* Young, 209 U. S., 123, is as follows :

" It may therefore be said, that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affects its rights."

In the case at bar we have a situation corresponding exactly to that outlined by the Honorable Justice.

If we take section 27 as amended March 15, 1902, (being the underground feature of the ordinance), we can get some idea of the penalties attached to the Western Union Telegraph Company for daring to question the reasonableness of the ordinance in that particular alone. The requirement of the section is that within twelve months from the date of the approval of the ordinance all wires be removed from overhead and placed under ground within a certain district, and that :

" Any company, corporation, partnership or individual owning or controlling any such overhead wires, cables or appliances or poles, that refuses, neglects or fails to remove them from overhead, within the time as hereinbefore provided, shall be liable to a fine of not less than \$100 or more than \$500 for *each pole* so remaining, to be imposed by the Police Justice of the City of Richmond, and for every week of continued failure and neglect to remove them after the imposition of the fine above mentioned, such company, corporation, partnership or individual shall be liable to a fine of not less than \$100 nor more than \$500, to be imposed as above stated " (Record, p. 51).

At the minimum penalty named the telegraph company has already incurred penalties during this litigation for each pole within the underground district amounting to \$46,800, and at the maximum figure the penalties amount to \$234,000 for each pole in this territory, under this one section. According to Mr. Merrihew's testimony there are 32 poles within the underground territory (Record, p. 154). The respective totals of the minimum and maximum penalties therefore amount to \$1,369,600 and \$6,848,000. When we consider that the amount of penalties incurred at the minimum figure for each pole represents much more than the total value of all the property of the Western Union Telegraph Company in the territory in question, the exact nature of this provision of the ordinance will readily be seen, and it is respectfully submitted that it falls directly within the definition of Justice PECKHAM in *ex parte* Young, 209 U. S., 123, and of Justice BREWER in *Cotting vs. Kansas City Stock Yards*, 183 U. S., 79.

This, it is to be noted, has reference to one section only of the ordinance complained of, and when considered in connection with the other penalties attaching under the remaining sections of the ordinance, it is submitted that there can be no doubt that this ordinance falls within the class of legislation condemned by this court in the cases above cited.

Fourth.

With respect to the requirement of the ordinance that the city shall have the right, through the Board of Fire Commissioners, to run city wires on appellant's poles, and also to have one duct free in the conduit, the appellee's brief quotes from the opinion of the Circuit Court as follows:

"Section 6 in reserving to the board of fire commissioners the right to run such wires as are needed

for the fire alarm and the police telegraph departments of the city of Richmond, on the poles erected or allowed under the ordinances mentioned, is a wise provision, beneficial to the public, not burdensome to the complainant, and makes unnecessary the erection of additional poles on crowded streets for those purposes."

and also quotes the position of the Circuit Court with respect to the conduit section as follows :

" I think the complainant is shown by the record to be unreasonably apprehensive of the result that will follow the enforcement of these sections. Their provisions apply to all alike, are not peculiar to the city of Richmond, but are found in the enactments of most of the cities of the United States. At one time not necessary they are now absolutely essential, and not only is the convenience and safety of the public subserved by them, but also do they protect the interests and facilitate the business of the complainant. It is to be regretted that their enforcement will cause trouble and expense to the complainant, as it will also to the defendant, but that is no reason why they should not be respected, nor does that make them unreasonably burdensome. In fact the evidence taken and the case submitted, discloses no effort on the part of defendant to discriminate against the complainant, to impose upon it unnecessary restrictions, to regulate it by unreasonable provisions, or to cause it to pay excessive charges for its privileges."

With respect to the extract from the opinion of the lower court first above quoted, this quotation will serve to indicate the extent to which the court below misconceived the contention of appellant in its bill, and in its argument before that court. It has never been the contention of appellant herein that the provisions of section 6 requiring the wires of the city and other wires carrying light current of electricity to be consolidated upon one line of poles, was in that respect unreasonable.

Such a provision is unquestionably a wise provision in a large city, nor has it been contended that the city's wires could not also properly, and under proper regu-

lations, be placed upon the same line of poles. The difficulty with respect to section 6 so far as relates to the city wires is that the city has no right, in the enactment of such a police measure, to make such police regulation a means of obtaining revenue, and the requirement that the city, in compelling the companies to consolidate their lines and place them upon one line of poles, shall, as a condition to such consolidation, have the right to use so much of such line of poles as it sees fit through its officers to preempt for that purpose, is not a reasonable provision.

So, likewise, under the conduit provision, the learned Circuit Court evidently considered that the sole contest which the telegraph company was making was as to whether its wires should be placed underground, and many of the authorities in the brief of appellee are addressed to the proposition (a proposition which is expressly admitted by appellant), that the city has the right to require such change. This was admitted in terms in the amended bill and in the argument in the court below, so that it is unnecessary to consider that portion of the case or make reference to the authorities which appellee cites in support of its third proposition.

We come then to a consideration of the basis upon which appellee seeks to sustain the ordinance in the requirement respecting the free duct for the city in the conduit and the free attachment on the poles in the streets.

This is sought to be sustained upon the theory that it is rental. Thus, on page 52 of appellee's brief, it is stated that :

"The furnishings of positions for certain city wires on the poles and in the ducts of every electrical company using the streets of the city, was undoubtedly intended to be a part of the charge for the use of the streets by said companies."

A little analysis will show the inapplicability of this position to the ordinance in question. In *St. Louis vs. Western Union Telegraph Company*, 148 and 149

U. S., this court announced that a reasonable rent was chargeable to a telegraph company for the occupation by its poles of space in the city streets. It was likewise held in that case that the city could not arbitrarily fix such rental, but that the ultimate tribunal on the amount of such charge was the courts. It is not, and has never been, the purpose of the telegraph company to seek to attack the position taken by this court in that case. It is evident, however, that the view of this court was that such rental was a definite thing to be determined with reference to the value of the space occupied by the poles. This would not be a shifting varying value, but would be a fixed and certain amount.

In the ordinance in question the city of Richmond has established a charge which alone will meet all the requirements of the decision in the St. Louis case—namely, a charge of \$2 per pole, which the telegraph company as owner is required to pay. We say that this charge meets the requirements of the St. Louis case, and whether reasonable or not, large or small, it is the amount fixed by the city, and it is the only thing in the ordinance which will meet the requirement of rental, inasmuch as it is a definite sum, and bears some relation to the definition of rental as established by the St. Louis case, which the city of Richmond may require of the telegraph company for the space occupied. It is obvious, however, that the value of the space occupied by the poles has no relation to the number of wires which the city may require for its electrical purposes. The requirements of the city for electrical purposes depend upon the extent to which its police use telephones and to which its fire alarm system is extended and used, and these requirements vary from time to time without reference to any change in the values of the rental for the poles. If the city is entitled to require payment of a rental, it is evident that it must be, as announced by this court in the St. Louis case, a sum for the use of some definite space or property occupied by the telegraph company

to the exclusion of the city. This is met by the requirement that for each pole \$2 shall be paid annually to the city. But no such provision is met by the requirement that the city may occupy space on these poles to any extent which its electrical needs from time to time may require. It is evident that if the city is entitled to fix the rental according to the requirements of its electric bureau the telegraph company would have a rental to pay which would vary in no respect according to the value of the property used or space occupied, but according to the wishes and needs of the city.

It therefore cannot be sustained, under the principle of the St. Louis case, as a charge for the use of the streets, and when the entire situation is considered such a requirement will appear in value to be wholly beyond any rent which could be imposed under this decision.

Taking the overhead wires as an illustration with respect to this, we have a pole rental of \$2 for each pole, which, at 40 to the mile, as the testimony shows, would be \$80 per mile of rental for space occupied by the poles. The sole testimony with respect to wire attachments is to the effect that each wire attachment to each pole is worth $37\frac{1}{2}$ cents per annum at a fair valuation (Record, p. 158). The city has 21 attachments on some of the poles for fire alarm purposes, and six attachments for telephone wires, which would amount to \$10.12 for each pole thus, occupied, or at the rate of \$484.80 per mile of annual rental to the city for 40 spaces not exceeding 18 inches in diameter along the streets of the city, and adding the charge of \$2 per pole, we have a total annual rental of \$484.80, or \$12.12 per pole. It is no answer to this argument for the city to say that it only occupies to this extent part of the poles. This illustrates the absurd position of the city attorney in attempting to sustain this exaction upon the theory of rentals. The rental for space occupied by the poles should be the same under similar conditions whether occupied

by the city wires or not, and yet the annual rental for a pole unoccupied by any city wires under this ordinance would be \$2, while the rental for a pole occupied to the extent indicated above would be \$12.12. Such a difference cannot be held to be reasonable.

The conduit provision works out no better for the argument of the City Attorney when we consider it. We have one duct set apart for the city in which it may place such wires as it may see fit, and under section 32 the telegraph company is in addition to furnishing the duct to the City free, required to pay \$2.00 per mile per wire for each wire of the telegraph company in the conduits, and with 150 wires to the duct, there would be an annual rental to the telegraph company on these wires in the duct under this section of \$300 per mile. The telegraph company would also furnish a free duct to the city, the rental of which at the regular rate of five cents per foot, or \$264 per mile making a total rental from the Telegraph Company to the City of \$564 per mile per annum for the use of the space under the streets occupied by the conduits. This would be not to exceed two feet in width by about eight inches in depth and from 18 to 24 inches below the surface, with an opening every 350 to 500 feet, covered with a heavy iron casing. The ordinary rental of each duct in such conduits from the owner who has constructed them, and furnished all the capital therefor would be five cents per foot, or \$264 per mile per year; that is to say, under this ordinance the Western Union Telegraph Company is required to furnish all the capital to build this conduit for its own use, adding one spare duct which it may never use with the consent of the city, furnish one duct free to the city, and pay the city therefor an annual rental amounting to \$564 per mile for the space occupied in the streets, whereas if it were permitted to rent a duct from a party building the conduit and furnishing all the capital, would cost it only \$264 per year.

Such a result shows conclusively that the ordinance

cannot be sustained upon the theory that the charges and requirements of the ordinance are only equal to a fair rental for the use of the space in the streets occupied by the conduit.

Appellee cites the case of Postal Telegraph-Cable Company vs. Chicopee, 207 Mass., 314; 93 N. E., 927, as sustaining the right of the city to string wires upon the poles, as compensation for the use of the streets, to make such a charge, but an examination of the case indicates that it does not sustain the proposition for which it is cited. The suit was for an injunction, it being claimed by the complainant that under the ordinance the requirement as to permitting the city wires to be there free was unreasonable. The ordinance also required other companies' lines to be placed upon the same poles. After holding that such regulation was not an interference with interstate commerce, the court denied the injunction upon the ground of laches, and says that if the existence of defendant's wires upon complainant's poles was a technical invasion of complainant's rights—

“ We are of opinion, upon the facts of this case, that the relief granted should not be by injunction against the continuance of the wires upon the poles, thus compelling the erection of new poles and the attachment of the wires to them. The master has found that this change could not be made without a large expenditure of money. * * * It would be more equitable, if the plaintiff's rights were established, that its relief should be by compensation in damages.”

It further appears in the case that there was no attempt by any other requirement in the ordinance to compel the payment in any other manner for the space occupied by the poles, as, in the case at bar, by the additional requirement of \$2.00 per pole per year.

It further appears in the case that this condition was named by the city before the pole line was constructed, and the telegraph company expressly accepted the ordinance with this provision in it, and only six

wires of the city were affixed to the poles, and no other return whatever was made to the city for the use of the streets. After many years the telegraph company sought to enjoin the occupancy by the city of its poles and the injunction was denied. In the case at bar the ordinance complained of was passed after the poles were located in the City of Richmond, and the ordinance is attacked as unreasonable upon this and many other grounds.

Upon page 100 of appellee's brief we find the following :

"So far from there being any contract, the obligations of which are violated by the city of Richmond, the appellant, by its litigation, is seeking to violate a contract which it has made with the city of Richmond under the ordinance by which it obtained the right to occupy the streets of the city of Richmond.

"In *Toledo v. Western Union Telegraph Company*, 46 C. C. A., 111, it was determined that a telegraph company which has accepted the provisions of the act of 1866 is not entitled to erect and maintain its lines over the streets of the city without complying with the reasonable regulations of the city for the erection and maintenance of such lines and without procuring a permit therefor."

Under the first point in this brief, we have touched upon the question of contract under which it is claimed the appellant is occupying the streets of the city of Richmond.

The case of *Toledo vs. Western Union Telegraph Company* cited by appellee shows the recklessness with which cases are cited on appellee's brief. It was a case of an application for an injunction against the city of Toledo restraining that city from interfering with the operation by the complainant of its wires and call boxes extending to customers' houses. The injunction had been granted upon the ground that the company had complied with the provisions of the Act of Congress of July 24, 1866, and that these operations by it were free from interference by the City. The case was reversed by the Circuit Court of Appeals upon the

ground that under the Act of 1866 the right to install a district telegraph system in the city of Toledo was not one of the rights secured to complainant, following the decision of this court in case of City of Richmond vs. Southern Bell Telephone and Telegraph Company, 174 U. S., 761, which limited the rights under that Act of Congress to telegraph business as such. In the case at bar the main lines of the telegraph company are involved and its rights to do its telegraph business for the public and the Government of the United States free from unreasonable interference of the City authorities are the subject matter of inquiry.

Respectfully submitted,

RUSH TAGGART,
Attorney for Appellant.

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U. S. Supreme Court, U. S.
BUILDING.

FEB 8 1912

JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 195.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant.

vs.

THE CITY OF RICHMOND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE CITY OF RICHMOND.

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STATEMENT OF CASE.

This is a direct appeal from a decree of the United States Circuit Court for the Eastern District of Virginia, refusing the Western Union Telegraph Company an injunction prayed for in its original and amended bills to restrain the City of Richmond from enforcing the provisions of certain ordinances of the City relating to the maintenance of all poles and electrical wires strung thereon, along and under the streets, and, more especially from enforcing the provisions of sections 27 and 28 of said ordinance, which required all poles within certain territory to be removed and the wires strung thereon to be placed in conduits under the streets. These particular sections are in the following language:

"27. The telegraph, telephone, and electric light and power overhead wires and cables (other than trolley wires), and all other overhead appliances for conducting electricity, and the poles therefor, heretofore and now being in any street, alley, or public ground of the city, owned and maintained under any existing franchise, are hereby ordered to be removed from the following-named streets, to-wit: On Broad street from the western side of Adams street to the east side of Eleventh street; on Bank street from the western side of Ninth street to the eastern side of Twelfth street; on Main and Cary streets from western side of Seventh street to eastern side of Fourteenth street; on Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth streets from the northern side of Broad street to southern side of Cary street, within twelve months from the date of the approval of this ordinance, and any such wires hereafter installed under any existing franchise, or under any franchise hereafter granted, shall, within the limits of the above-described district, unless otherwise provided by the city council, be placed underground within twelve months from the date of permission granted by the city council. Any company, corporation, partnership, or individual, owning or controlling any such overhead wires, cables, or appliances, or poles, that refuses, neglects, or fails to remove them from overhead within the time as hereinbefore provided, or which fails to place said wires hereafter installed in the said underground district underground, as hereinbefore provided, shall be liable to a fine of not less than \$100 nor more than \$500 for each pole so remaining, to be imposed by the police justice of the city of Richmond, and for every week of continued failure and neglect to so remove them after the imposition of the fine above mentioned, such company, corporation, partnership, or individual shall be liable to a fine of not less than \$100 nor more than \$500, to be imposed as above stated. And any overhead wires hereafter installed within the said underground district shall be installed subject to the provisions of this chapter. (March 15, 1902.)

"28. That all telegraph, telephone and electrical light and power wires and cables, including feed (but excluding trolley wires) and all other appliances for conducting electricity, shall be removed from the streets, alleys and public grounds of the city of Richmond within the territory mentioned in the foregoing section within six months after the passage of this ordinance, and every individual, partnership, corporation or company owning such wires within said territory shall, within two months after the passage of this ordinance, submit to the

committee on streets and Shockoe creek plans and details showing the location, plan, size, construction and material of such conduits. Such plans may be altered or amended by said committee and when satisfactory to it shall be approved, and thereupon it shall be the duty of the owner of such wires to proceed with the construction of such conduits in accordance with the plans so approved and in a manner satisfactory to the city engineer. The pavement of the streets and alleys wherein such conduits are laid shall be properly replaced and shall be kept in proper repair to the satisfaction of the city engineer, and the city shall be saved harmless from any and all damages arising from laying such conduits. Such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys, and shall provide for an increase thereof to at least the extent of 30 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership or individual, directly or indirectly, without the consent of the committee on streets, but the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires. After obtaining the consent of the committee on streets, any other person or corporation now having wires in the streets, or hereafter desiring to run wires therein, may occupy necessary and proper portions of such conduits and upon such terms as may be agreed upon with the petitioner: and in case of a disagreement, upon terms to be determined by arbitration as herewith provided: Any such company, corporation, partnership or individual so placing its wires underground in any street, alley or public ground of said city, shall, upon notice from the city or any of its departments that a local improvement or gas, sewer or water main, or branch thereof, is to be constructed or repaired in such manner as will necessitate the moving or altering of its conduit or conduits, or their appurtenances, of said individual, partnership or corporation, move or alter the same at its own expense so as to permit the construction of the improvement where ordered, and should any company or corporation omit to comply with such notice, the conduit or conduits, or their appurtenances, may be altered or moved by the city, and the cost and expense thereof recovered from such individual, company or corporation. Man-holes shall at all times conform to the grades of the streets. The location, size, shape, and subdivision of such conduits, and the material of which they shall be made and the manner of construction, shall be satisfactory to the city engineer. The work of laying underground conduits, tubes, pipes, electrical conductors, cables

and wires shall be under the direction and to the satisfaction of the superintendent of fire-alam and police telegraph, who shall at all times have free and unobstructed access to the conduits, tubes, pipes, electrical conductors or cables for the purpose of inspecting the same or making connection therewith for conduit wires or conductors in use or to be used by the city. (December 18, 1903.) Record pp. 124-127.

Before the complainant company or its predecessor, the American Union Telegraph Company, entered the City of Richmond with its poles and wires, the Legislature of the State had made the right of all telegraph companies to erect poles and string wires thereon, in any city or town, dependent upon such company first obtaining "the consent of the council or trustees thereof."

The act so providing was approved February 10, 1880, and is in the following language:

"1. That inventors of any system of telephone or telegraph, or their assigns, upon producing proof of such invention or assignment to the board of public works and obtaining its assent, any telephone or telegraph company chartered by this or any other State, or by an act of Congress of the United States, may construct and maintain such telephone or telegraph along any of the State or county roads or public works, and over the waters of the State, and along and parallel to any of the railroads in this State: provided, the ordinary use of such roads, works, railroads, and waters, be not thereby obstructed, and along the streets of any city or town, with the consent of the council or trustees thereof, and such companies shall be entitled to the right of way over the lands, privileges and easements of other persons and corporations, and the right to erect poles, piers and abutments necessary for constructing, working and maintaining their lines upon making just compensation therefor; that when such telephone or telegraph company shall fail on application therefor to secure by contract or agreement such right of way for the purposes aforesaid over the lands, privileges or easements of another person or corporation, commissioners shall be appointed and shall act with the powers as provided in sections seventeen, eighteen, nineteen and twenty of chapter fifty-six of the Code of eighteen hundred and seventy-three, which said sections are hereby made applicable to this act, and the term 'land' in said section of said chapter fifty-six of said Code of eighteen hundred and seventy-three shall be held to embrace

and include an interest, use, privilege, or easement in or over land; and such persons or companies may make reasonable charges on messages or intelligence transmitted by such telephone or telegraph. But no company operating under the provisions of this act shall have the power to contract with any owner of land or any other corporation for the right to erect and maintain a telephone or telegraph over his or its land, privileges or easements to the exclusion of the lines of other companies operating under the provisions of this act." (Acts 1879-80, pp. 53-4); Record p. 58.

The said American Union Telegraph Company recognizing its obligation to conform to said act of the General Assembly of Virginia applied to the council of the city of Richmond for the privilege of erecting poles and stringing wires along the streets of the city, and the council, in response to said request, enacted the ordinance of March 17, 1880. That ordinance is in the following language:

AN ORDINANCE

To allow the American Union Telegraph Company to erect telegraph poles and run wires along certain streets.

(Approved March 17, 1880.)

Be it ordained by the council of the city of Richmond, That leave is hereby given the American Union Telegraph Company by its officers, employees or agents, to erect the necessary poles, the same to be symmetrical in shape, properly painted, and duly secured from falling, to convey the wires of said company through the streets of the city from a point on Broad street, near its intersection with Harrison street to Pine street; thence down Pine to Belvidere, along Belvidere from Grace to Canal; thence across Madison, Jefferson and Adams to Byrd street, along Byrd from Adams to Twelfth street, along Twelfth from Byrd to Canal street, Canal from Twelfth to Thirteenth, Thirteenth from Canal to Main street; the said poles to be erected inside of the curbstones, and with as little interruption to travel and traffic as possible, and under the general supervision and control of the city engineer. It is further understood and agreed as part of the consideration of this contract, that the said American Union Telegraph Company shall not assign this route or privilege to any other

person or corporation whatever, and that the privilege hereby granted shall be revocable at the pleasure of the council." (Ordinances and Resolutions of the City Council of Richmond, 1878-1880, p. 28.) Record pp. 58-59.

That subsequently, on the application of the complainant company to be allowed to assume and exercise the rights granted to the American Union Telegraph Company under the last above quoted ordinance of March 17, 1880, the council enacted the following ordinance:

AN ORDINANCE

To amend Chapter 34 of the City Ordinances, concerning Streets.

(Approved July 16, 1881.)

"Be it ordained by the council of the city of Richmond, That chapter 34 of the city ordinances be amended by adding thereto the following sections:

"60. No telegraph poles or posts shall be erected on Main street, in the city of Richmond, or any part of said street, and all such poles or posts now on the said street shall be removed within thirty days from the due publication of this ordinance by the party or company maintaining or using the same. Every day's continuance of such pole or post on Main street after the expiration of such period of thirty days shall constitute a separate offence, and shall be punishable by a fine of not less than five dollars nor more than ten dollars for each pole or post, recoverable in the court of the police justice against the party, company or corporation maintaining or using the said pole or post.

"61. The privilege of erecting poles or posts in this city, granted the American Union Telegraph Company by an ordinance approved March 17, 1880, so far as the same is not inconsistent with the provisions of section 60 of this chapter, is hereby granted the Western Union Telegraph Company; but all license or permission to any party or corporation to erect such poles or posts on Main street is hereby revoked and annulled." (Ordinances and Resolutions of the City Council of Richmond, 1880-1882, p. 17, Richmond City Code, 1885, p. 183.) Record pp. 59-60.

The record further discloses that soon thereafter (December 9, 1881), the complainant company appeared before the committee on streets of the council by its attorney, and asked that all penalties incurred by it on account of its failure to remove its poles from Main street as required by said ordinance of July 16, 1881, be remitted, and thereupon said committee recommended for adoption a resolution granting its request, which resolution is in the following language:

"Resolved, the Common Council concurring: Whereas, the object of the ordinance approved July 16, 1881, requiring the removal of poles and posts from Main street, was to secure the unobstructed freedom of the principal thoroughfare of the city, and not to raise revenue; and, whereas, the Western Union Telegraph Company has signified its readiness, without contest, to remove its Main street line, provided another suitable route be guaranteed to it; therefore, be it resolved, that all penalties, if any, incurred by said company under said ordinance, be, and they are, hereby remitted, and said company is hereby authorized and permitted to erect the necessary poles—the same to be symmetrical in shape, properly painted, and duly secured from falling—to convey the wires of said company through the streets of the city by the following line: From main street down Eighth to Cary street, down Cary street to Thirteenth street, and up Thirteenth street to the office of the company, corner Thirteenth and Main streets, on condition of the removal of said company's poles or posts from Main street at its own expense, within sixty days; the said poles to be erected inside of the curbstones and with as little interruption to travel and traffic as possible, and under the general supervision and control of the City Engineer. And the privilege hereby granted shall be revocable by two successively elected councils.

Adopted by Board of Aldermen December 12, 1881.

Concurred in by Common Council January 2, 1882.

Approved by the Mayor January 5, 1882.

A copy-true:

BEN. T. AUGUST,

City Clerk

Record pp. 71-72.

Such are the undisputed facts and circumstances surrounding the entry of the complainant company upon the enjoyment of its

rights and privileges upon the streets of the City of Richmond, about which the City of Richmond in its answer to the original bill uses the following language:

"It thus appears that the complainant company, and its predecessor, the American Union Telegraph Company, fully understood and recognized the necessity of applying for and obtaining permission of the council of the City of Richmond to erect its poles and run its wires along and over the streets and alleys of the said city, and that the conditions under which said consent was given were that the poles of the company should be erected and maintained "under the general supervision and control of the city engineer," and the privileges thereby granted "should be revocable at the pleasure of the Council."

"Respondent is advised, believes, and therefore charges, that the complainant company is estopped by its conduct in making application for and in accepting the privileges granted by the aforesaid ordinance, from claiming that the said act of the General Assembly of Virginia, and the said ordinances of the city are in violation, either of the acts of Congress or of the Constitution of the United States, and respondent is also advised, believes and charges that the said ordinances in connection with the acceptance of the provisions thereof by the complainant company, constitute a contract which the said company had the power to make and did make, and having thus accepted the privileges granted by the said ordinances and the advantages which sprung from them, said company cannot be permitted to hold on to the privileges or rights granted, and at the same time repudiate the conditions and restrictions placed upon it as conditions under which said privileges were granted. Respondent in effect said to complainant by the said ordinances, 'You can occupy the streets under certain terms.' The company accepted these terms and to permit it to repudiate the conditions under which it obtained such permission would be to allow said company to hold on to the privileges and rights granted, and, at the same time, repudiate the conditions, without the acceptance of which it could never have obtained the privileges which it sought." Record pp. 60-61.

After the taking of evidence which appears in the record from page 152 to 204, inclusive, the case was argued before his Honor, Judge Nathan Goff, United States Circuit Judge, December 8,

1908, but on account of his ill-health was not decided until December 18, 1909, when he refused "to grant the injunction prayed for in the original and amended bills," and vacated and dissolved "the temporary restraining order entered by Honorable Edmund Waddill, Jr., United States Judge, on the 21st day of June, 1904," and ordered "that the said original and amended bills be dismissed." Record pp. 299-300.

With the record the learned judge filed an able and elaborate opinion, which will appear on pages 285-299 of the record and also in 178 Federal Reporter 310, where the case is reported.

The following is the statement of the pleadings and facts of the case, made by the learned judge:

"The Western Union Telegraph Company, a corporation organized under the laws of the State of New York, filed the bill in this case against the city of Richmond, a municipal corporation existing under the laws of the State of Virginia. The cause of action is alleged to be between citizens of different States, and also as arising under the Constitution and laws of the United States.

It is claimed that complainant has been since the year 1851 engaged in the construction and operation of telegraph lines in all the States and Territories of the United States and in the Dominion of Canada, and that in connection with submarine cables it has telegraphic communication with foreign countries; that its system comprises over 192,000 miles of poles and cables, over 900,000 miles of wire, over 23,000 offices, and that it transmits annually about 65,000,000 messages for the public, for the government of the United States, and for the governments of foreign countries; that as part of its system, connecting with its main office in the city of New York and thence to all the commercial centers of the world, it has constructed and now operates a telegraph line over and along the streets and alleys of the defendant city.

The bill alleges that, by an act of the Congress of the United States, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," the provisions of which are substantially incorporated in sections 5263 to 5269, inclusive, of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 3579-3581), it was provided:

'Sec. 5263. Any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

'Sec. 5264. Any telegraph company organized under the laws of any state shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which their lines of telegraph may be located, as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

'Sec. 5265. The rights and privileges granted under the provisions of the act of July twenty-four, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes,' or under this title, shall not be transferred by any company acting thereunder to any other corporation, association, or person.

'Sec. 5266. Telegrams between the several departments of the government and their officers and agents, in the transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several departments of the government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

'Sec. 5267. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of the act of July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph

lines, and to secure to the government the use of the same for postal, military, and other purposes,' or under this title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

'Sec. 5268. Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law.

'Sec. 5269. Whenever any telegraph company, after having filed its written acceptance with the Postmaster-General of the restrictions and obligations required by the act approved July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes,' or by this title, shall, by its agents or employees, refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act, or by this title, or by the provisions of section two hundred and twenty-one, title 'The Department of War,' authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and force of storms, such telegraph company shall be liable to a penalty of not less than one hundred dollars, and not more than one thousand dollars for each such refusal or neglect. (To be recovered by an action or actions at law in any district court of the United States.)'

'Complainant shows that by an act of Congress approved June 8, 1872 (Act June 8, 1872, c. 335, 17 Stat. pp. 308, 309) all the waters of the United States during the time the mail is carried thereon, all railways and all parts of railways, all canals and plank roads, and all letter carrier routes established in any city or town for the collection and delivery of mail matter by carriers, were declared by Congress to be 'post roads,' and that by an act of Congress approved March 1, 1884, 'all public roads and highways, while kept up and maintained as such,' were declared to be 'post roads.' Act March 1, 1884, c. 9, 23 Stat. (U. S. Comp. St. 1901, p. 2708).

"Complainant says that, complying with the provisions of this act of July 24, 1866, it on or about the 8th day of June, 1867, duly filed its written acceptance with the Postmaster-General of the United States of the restrictions and obliga-

tions of that act, and that thereby it became entitled to all the rights and privileges conferred by it, and burdened with all the obligations imposed by it, and that it has continuously, since the filing of that acceptance, fully performed all the obligations and requirements of that act.

"Complainant alleges that, in compliance with the legislation mentioned, it has at all times carried for the government of the United States, over its lines situated along the streets and alleys of the city of Richmond, referred to in chapter 88 of the Richmond City Code of 1899, and especially the streets and alleys named in the ordinance entitled "An ordinance to amend and re-ordain section 27 of chapter 88, Richmond City Code (1899), requiring telegraph, telephone, and electric light and power wires to be placed underground on certain streets of the city," approved March 15, 1902, at rates far below the reasonable rates charged to and paid by individuals for similar services, communications relating to the meteorological and signal service, from the various stations thereof.

"Complainant claims that all the streets and alleys of the city of Richmond are post roads, within the meaning of said acts of Congress, and that complainant has the right to construct, maintain, and operate lines of telegraph over and along all of them, in such manner as not to interfere with the ordinary travel thereon; that the grant by the United States, in and by the legislation mentioned, of the right to construct, operate, and maintain its lines of telegraph upon all streets and alleys of the city of Richmond was made upon a full, valuable, and continuing consideration, paid and rendered by complainant to the United States; that such consideration was the agreement of complainant shown by its acceptance of the act of Congress, and by the full and complete performance by it of all the duties imposed by the Congress; that thereby the right granted to complainant to construct and operate its lines of telegraph over and along said streets and alleys became complete and vested, and is in full force and effect; that its lines have been constructed so as not to interfere with the ordinary travel on the streets and alleys mentioned; and that it is entitled to all the rights, powers, and privileges conferred by the act of Congress of July 24, 1866.

"The bill then recites that the defendant has enacted an ordinance concerning wires, poles and conduits in, over and under the streets of Richmond, published as chapter 88 of the Code of that city, and has also passed certain amendments thereto, which are alleged to be grossly unreasonable and

illegal; that they are in violation of and repugnant to article 1, section 8, of the Constitution of the United States, and of article 14, section 1, of Amendments to that Constitution; that they violate the act of Congress approved July 24, 1866, as also the other acts of Congress that have been referred to; that they impose unreasonable and illegal burdens and obstructions upon foreign and interstate commerce; and that they deprive complainant of the rights, privileges, and property guaranteed to it by the Constitution and statutes of the United States.

"Complainant charges that said ordinance, each and every section thereof, and all amendments thereto, are unreasonable, unjust, illegal, and void for the following reasons: The city of Richmond is at no appreciable expense in issuing licenses under the ordinance, or in inspecting and supervising the poles, wires, and other appliances of complainant; the charges imposed are not based on any proper estimate of the costs and expenses of the city because of such inspection and supervision, but are enormously in excess of any amount that could be incident to such expenditures, and as could properly be incurred in connection with reasonable precautions required for the safety of the public; the poles, wires, and other appliances are so located as not to interfere with any kind of traffic, are not old and decayed, but new and sound, and cause no fear of accident, and are kept in good order by complainant for its own protection; that all provisions of the ordinance and of all sections and amendments thereof, requiring complainant to construct and maintain conduits and run its wires therein, and imposing charges on the same, and requiring the removal of the poles, wires, and other appliances from the streets and alleys, are unreasonable and illegal, and deny to and deprive complainant of its rights, powers and privileges under the Constitution and laws of the United States; that such charges are enormously more than can lawfully be imposed under any right held by the defendant to make charges for legal purposes; that complainant is paying the city the same property tax on its wires, poles, and other appliances which is imposed on other corporations and citizens, and in addition is paying the large sum of \$500 per annum as a specific license tax, and that the fees, taxes, and charges imposed by said chapter 88, with its amendments, are unreasonable and illegal; that by said chapter the management of complainant's lines and the control of its business is taken largely out of its hands, and placed in charge of the city engineer and the committee on streets of defendant.

"The bill sets forth, in substance, the different sections of said chapter 88 complained of, and makes various allegations concerning some of them, to which reference is now made. That section 1 provides that the city engineer is to determine the size, quality, character, number, and location of complainant's poles before they can be erected, and is authorized to order changes of location at any time. Complainant alleges that the power so given the engineer is absolute and final; no provision being made to appeal from his decision, however unreasonable and burdensome it may be. That section 2 provides that all poles now erected for the support of wires, except such as support wires required by the city ordinances, shall be allowed to remain only upon terms and conditions in said ordinances mentioned; and this section, it is charged, practically annuls the act of Congress of July 24, 1866. That under section 4 the committee on streets can require complainant to allow other persons or companies to put such wires upon its poles as will not in the opinion of the committee unreasonably interfere with complainant's business, upon such terms and conditions as may be agreed upon between the parties interested, which complainant says is unreasonable, as the committee is made the absolute judge as to the interference referred to, and no provision for an appeal is provided; and complaint is also made of the method of securing an arbitration of such matter should the parties fail to agree among themselves. That section 5 gives the city engineer absolute and final power to determine the size, quality, number, location, and manner of erecting all poles, with no provision for an appeal, however unreasonable and arbitrary his action may be. That section 6 provides that the city shall have the right to run all wires needed for its fire alarm and police departments on all poles allowed to remain on any street or alley, and in such places on the poles as shall seem proper to the superintendents of those departments; the allegation being that no compensation is to be made by the city to complainant for this use, and that no limit is fixed as to the number of wires that may be so placed. That section 8 gives the city council the right to put at any time, other restrictions and regulations as to the erection and use of poles, wires, and other apparatus, to require other poles to be removed, and the wires thereon to be run in conduits, "upon such terms as the city may deem proper," no provision being made for an appeal; complainant saying that, by acceding to the provisions of this section and of this ordinance, it would surrender its rights under the Constitution and laws of the United States,

and submit itself to the mercy of the city. That section 10 requires that a fee of \$2 for each telegraph pole used and maintained in any of the parks, streets, and alleys of said city shall be paid annually to the treasurer of the city, which complainant charges is a gross violation of its rights and privileges, and an unreasonable burden upon its foreign and interstate commerce, and is largely more than could be legally charged as a rental for the space occupied by such poles, and enormously more than could be charged under any lawful form of taxation. That section 13 provides that any corporation using or maintaining such poles which shall have failed by the 20th day of January of each year to pay said fee of \$2 per pole shall be liable to a fine of not less than \$5 nor more than \$100 for each pole upon which it is in default, and that each day of default shall be a separate offense; the fines to be imposed by the police justice of the city. That section 25 provided that each and every provision of the ordinance, unless otherwise provided, shall apply to any pole, wire, or other apparatus used in connection with the transmission of electricity thereafter erected, whether the same be by way of repairs or for additional routes. That section 26 provides that any person violating any restriction, provision, or condition imposed by, or failing to perform any requirement made under, said chapter by the city engineer, the superintendent of fire alarm, or chief of the fire department, concerning which there is not in the chapter a specific fine imposed, shall be liable to a fine of not less than \$10, nor more than \$500, to be imposed by said police justice; each day's violation or failure to be a separate offense. That section 27, as amended March 15, 1902, requires all the poles, wires, and cables mentioned to be removed within 12 months from certain of the streets of the city of Richmond, embracing a large part of complainant's system, and placed underground, and directs that any such wires subsequently needed within said limits should be likewise so placed, and provides further that any company owning or controlling such wires and poles that shall refuse or neglect to so remove them shall be liable to a fine of not less than \$100 nor more than \$500 for each pole so remaining, to be enforced by the police justice of the city, and for every week of continued failure to so remove after the imposition of such fine such company is to be liable to a further fine of not less than \$100 nor more than \$500; complainant insisting that said section is grossly unreasonable, illegal, and in violation of its rights and privileges, and therefore null and void. That

section 28, as amended December 18, 1903, requires complainant to not only go underground with its wires along the streets and alleys of the 'underground territory' of the city, but also requires it to build conduits, not of a character satisfactory to complainant, nor adequate to its purposes, but satisfactory to the 'committee on streets and Shockoe creek' and to the city engineer, and directs that such conduits shall be of sufficient capacity to accommodate the wires of complainant, as well as certain wires of the city, which are to be carried free of charge, one duct at least being reserved for that purpose; and further that the conduits shall be of sufficient capacity to accommodate other wires in the streets and alleys of such underground territory, and also provides for the increase of such wires to the extent of at least 30 per cent.; but, no matter what complainant's necessities may be, such increase is not to be occupied by it without the consent of said committee, while any other person or corporation desiring to run wires therein may, after obtaining the consent of that committee, occupy such portions of the conduits, upon terms as may be agreed upon by arbitration. That the provisions of section 30 are similar to those described in the preceding sections, are as unreasonable and as radical, and are intended to be enforced by excessive and illegal penalties. That 31 is one of the most objectionable sections in which it is provided that no privilege as to the building of conduits shall last longer than 15 years, at the expiration of which time the city may impose such other restrictions, conditions, and charges as it may see fit and shall be lawful, or may order their removal at the expense of the owner. That section 32 provides that, for the privilege of using and occupying the streets, each person or corporation owning or using any wire or wires run in the conduits shall, each year until January 1, 1900, pay to the city treasurer a sum equal to \$2 per wire per mile, and that after that date the city council reserves the right to charge such larger compensation for the residue of the term of the privilege as it may see fit; that said section also requires each person or corporation, to render to the city a sworn statement as to the number and length of each of said wires, the committee on finance having the power to have examined the books of such person or corporation, to ascertain if the statement so made is accurate; severe penalties being imposed for failure to permit such examination. That section 33 contains a provision which removes the only limitation that the ordinance had provided, and states that the con-

duit system shall be extended from time to time, so as to cover streets and alleys upon which the council may determine that no overhead wires shall be run, thereby placing complainant at the absolute mercy of the city.

"The bill then proceeds to charge that the amendment to section 28 of December 18, 1903, required complainant to remove all of its poles, wires, and other appliances for conducting electricity within the district mentioned in section 27, as amended, within six months from the approval of said amendment to section 28, and as that period has expired, complainant, not having complied with such requirements, is threatened by the defendant, through its attorney, and charges that the city intends to proceed forthwith to impose and collect the penalties provided for by said chapter 88, and that defendant is going to use the penal features of such enactments in order to compel complainants to remove its poles and wires from the underground territory, as described; that it has paid to the defendant the license tax of \$500 imposed for the current year, also the tax of \$2 per pole for said period, and all ad valorem and property taxes required of it; that no adequate remedy exists save in a court of equity, and that irreparable injury will ensue unless defendant is enjoined from enforcing such penal features, and unless said ordinance and the sections especially referred to are decreed to be unreasonable, null and void.

"The prayer is that the city of Richmond be restrained from enforcing the provisions of any of the sections of the chapter of the city Code mentioned, or any of the amendments thereto, and that the same may be declared to be unreasonable and illegal, and, pending the hearing of an application for injunction, that a restraining order may issue.

"The bill, duly verified, was presented to the court, on consideration of which the restraining order asked for was granted, by which the city of Richmond, its officers, agents, and attorneys, were restrained from enforcing the fine and penalties imposed by said chapter 88 and the amendments thereto, and from removing from the streets and alleys of the city of Richmond the poles, wires, cables, and appliances of the complainant.

"To this bill the defendant appeared and filed a demurrer, which after argument was overruled. I do not find it necessary to set forth in detail the grounds of the demurrer, the main points of which will be alluded to hereafter. The defendant incorporated in its answer the points in substance on

which it relied in the demurrer, which on the pleadings and evidence, are now to be finally disposed of.

"The answer admits the citizenship of the parties and the amount in controversy to be as alleged in the bill, and also that the case is one arising under the Constitution and laws of the United States. Defendant admits that all of the streets and alleys of the city of Richmond, along which complainant has erected its poles and strung its wires are post roads, under the act of Congress referred to and under the Constitution of the United States, but denies the claim of complainant that under the same, by having accepted the provisions of that legislation, that complainant has the right to construct and maintain its lines over and along said streets and alleys, without reference to the requirements of the statutes of the State of Virginia and the ordinances of the city of Richmond as to the location and construction thereof; defendant insisting that, according to the intent and meaning of the act of Congress and of the statutes and Constitution of the United States, the complainant has no right, except in conformity with the statute of the State of Virginia and ordinances of the city of Richmond, to maintain its lines of telegraph upon and along the said streets and alleys; that the American Union Telegraph Company, of which complainant is the assignee and successor, claiming under the ordinance of the defendant of March 17, 1880, obtained by that ordinance permission to erect poles and run wires along and over the said streets and alleys, as provided for by the laws of the State of Virginia, the said assignor of complainant thereby recognizing its obligation to comply with such laws by applying to and obtaining the consent of the council of the city of Richmond; therefore defendant charges that, by its conduct and by accepting the privileges granted by the ordinance under which its assignor claimed, the complainant is estopped from insisting that the Virginia legislation referred to and the ordinances of the city of Richmond are in violation either of the acts of Congress or of the Constitution of the United States, and further that complainant is bound by the contract thereby entered into. Defendant admits that it has enacted said ordinance, No. 88, and the amendments thereto as shown in the bill, but denies that it or the amendments thereto are unreasonable, illegal, or in violation of the act of Congress or of the Constitution of the United States, or of the complainant's rights and privileges, and claims in its answer that as the bill only charges that sections 27 and 28 are sought to be enforced; that all other questions involved in said ordinances are not now before the court.

Defendant, then specially replying to the complainant's allegations concerning the different sections of said ordinance, insists that the provisions of each and all of them are reasonable, and that the requirements and restrictions within them found are legal, being justified by the necessities of the city, required for the comfort and safety of its citizens, and are but the proper exercise by the city of its police power. Other charges and denials in the answer found are not essential to the proper disposition of the case, and consequently will not be particularly referred to.

"With leave of the court an amended bill was filed, which in substance elaborated the specific allegations of the original bill, and to this amended bill the defendant filed an answer, in all material matters the same as its original answer, but neither the amended bill nor the answer thereto will be set forth in detail.

"Subsequently the defendant moved for leave to file an amended and supplemental answer, which the court refused to permit, but allowed a cross-bill to be filed, in which, among other matters, the city of Richmond sets forth that, by an ordinance of its council approved December 16, 1905, it was enacted:

"That chapter 88 of the Richmond City Code, 1899, shall be amended so as to add a new section to the end of said chapter in the words and figures following: (34) None of the obligations, burdens, and restrictions of this chapter shall, in any manner, interfere with or destroy the rights and privileges secured to telegraph companies, which have accepted the provisions of the act of Congress of July 24th, 1866.

"To this cross-bill an answer was duly filed by the defendant (the complainant herein), in which it was insisted that, notwithstanding such amendment, so passed as section 34, it would not be possible for complainant to proceed to take action under chapter 88 without subjecting itself to conditions and requirements which would interfere with the rights and privileges secured to it by the terms of the act of Congress of July 24, 1866, and to the answer, a replication was filed by the city of Richmond, and a replication by the complainant to the answer of defendant was filed. The case has been heard on the pleadings, depositions, exhibits, and arguments of counsel." (Record, pp. 285-293).

The learned judge in his opinion takes up *several* each of the objections of the complainant to the several sections of the ordinance and discusses and disposes of each of them adversely to

the contention of the complainant; (Record pp. 294-299) and in regard to the main contention as to sections 27 and 28, says:

"Sections 27 and 28, as originally enacted and as amended, are alleged by complainant to be specially burdensome, illegal, unconstitutional, and unreasonably restrictive of its rights, grants, and privileges. They determine and describe the limits of the 'underground district,' and require all poles and wires in use therein to be removed therefrom except trolley wires. They authorize any company to place its wires in conduits under the surface of the streets of the city, after application has been duly made by it for that purpose, in which the streets to be so used are to be named, and a map locating the conduits, with plans and details concerning them, is to be filed therewith. The permission to use the streets is then to be granted by the city council, under the conditions and regulations heretofore referred to. I think the complainant is shown by the record to be unreasonably apprehensive of the result that will follow the enforcement of these sections. Their provisions apply to all alike, are not peculiar to the city of Richmond, but are found in the enactments of most of the cities of the United States. At one time not necessary, they are now absolutely essential, and not only is the convenience and safety of the public subserved by them, but also do they protect the interests and facilitate the business of the complainant. It is to be regretted that their enforcement will cause trouble and expense to the complainant, as it will also to the defendant, but that is no reason why they should not be respected, nor does that make them unreasonably burdensome. In fact the evidence taken and the case as submitted discloses no effort on the part of the defendant to discriminate against the complainant, to impose upon it unnecessary restrictions to regulate it by unreasonable provisions, or to cause it to pay excessive charges for its privileges. The city council has acted within the limits of its police power, and the sections now under consideration, instead of being so unreasonable as to demonstrate an abuse of discretion, show rather a disposition to provide for and protect all alike, even if they do place burdens on those who enjoy the privileges they refer to and regulate. The 'underground section' is the populous and congested center of the city, where the poles and wires are an ever continuing danger to life and property, and the defendant in requiring their removal has acted wisely, and in directing that the wires be placed in conduits has well and reasonably provided for a difficult problem—one that it was its duty to con-

sider and dispose of. Complainant erected its poles and wires with the implied understanding that, if the public necessity required it, they should be changed or so regulated as to make their use of the streets as slight an inconvenience to the city as possible. If complainant now places its wires in conduits—as it must do unless it abandons the use of said streets—it will be with the understanding that if in the future the changes wrought by time may for the public weal demand their improvement or reconstruction, that it will submit thereto. The provision in section 28 that such conduits may be required to be changed or removed when the necessities of the public require it is simply the declaration of what the law now is, and does not impose an unnecessary burden, nor does it provide for taking property without due process of law. Our property rights must yield, sometimes without compensation, to the police power of the State when exerted in the interest of the health and safety of the public.

“The courts will not undertake to make reasonable regulations under which the business of complainant may be conducted in the city of Richmond, but will in a proper case, when that city has duly enacted such rules, determine whether or not they are reasonable.

“This court will not presume that the ordinance of the city yet to be enacted, as provided for in section 31, will be unfair and illegal, but does presume that, should it prove to be so, the court to which complainant may then apply will so hold, and will take jurisdiction of the matter, regardless of the fact that the city may not have so provided, as this court in this case took such jurisdiction.

“The city by the enactment of section 34 of the ordinance complained of declared that none of its ‘obligations, burdens, and restrictions’ should in any manner interfere with or destroy the rights and privileges secured to telegraph companies which have accepted the provisions of the act of Congress of July 24, 1886. This section can neither add to nor detract from the complainant’s rights under that legislation, but it may properly be considered in connection with said ordinance, when the motive of the council enacting it is sought for.

“That complainant was not given permission by the Congress to occupy the streets of the city of Richmond without paying its fair proportion of the taxes required to maintain the government of that city, and without being required to submit to all reasonable regulations provided for by its council, has been so often announced by the courts as to justify the suggestion that questions relating to such matters might well

be considered as disposed of. However, in deference to the earnest insistence of able and experienced counsel, I refer to a few of the decisions of the Supreme Court of the United States.

"In *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 100, 13 Sup. Ct. 485, 488, 37 L. Ed. 380, that court said:

'It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights.'

"In *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995, it is said:

'No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor. * * * In other words, if a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision.'

"In *Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162, the Supreme Court, speaking through Justice Harlan, said:

'The Circuit Court of Appeals, while holding that the plaintiff was entitled to avail itself of the provisions of the act of 1866—a question to be presently considered—adjudged that the rights and privileges granted by that act were to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the State or to one of its municipalities. This was in accordance with what this court had adjudged to be the scope and effect of the act of 1866.'

"In *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 548, 8 Sup. Ct. 961, 31 L. Ed. 790, I find the following:

'While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.'

"While it is true that the city cannot impose a tax upon the franchises of the company, as that would be a burden upon interstate commerce, still it can make a reasonable charge for the use of its property, in which all the public are interested; and if the complainant occupies any of such property there is no reason why it should not pay a reasonable rent for it, as all citizens and all other corporations do for a like use. It is not a tax, in the sense in which that word is ordinarily used, but it is in the nature of a special toll, imposed for a specific use of designated property by a particular party. The poles deprive the city and the public of the use of certain portions of the streets, and frequently necessitate the excavation, repair, and inspection of the same, causing expense to the city and inconvenience to the public. A toll of two dollars per pole per annum might be an unreasonable charge along a country highway, but in a thickly settled section, like the streets of the city of Richmond, where many people for various purposes make continuous uses of them, the sum of two dollars per year for such use per pole seems entirely proper and reasonable. It may not be improper in this connection to notice that I find from the record that complainant uncomplainingly paid this charge for over 20 years preceding the institution of this suit, and it seems to me that such acquiescence should, unless other reasons than those assigned exist, estop it from complaining now, so far, at least, as such charge is concerned." (Record pp. 296-299.)

This appeal brings these holdings under review here.

THE CASE ARGUED.

It must be conceded that the primary control of public streets and roads is with the Legislature of the State with the right, however, to delegate a part, or the whole of such control to the several municipalities in which the same are located. If authority for a proposition so elementary is needed reference is made to Dillon on Municipal Corporations, (5th Edition) sections 1128 and 1129, Elliott on Roads and Streets, section 421, *et sequa*, and particularly *St. Louis v. Western Union Telegraph Company*, 149 U. S. 465.

That, so far as the City of Richmond is concerned, a delegation of this power of control has been made to it, is undoubted.

By section 19 and sub-section VII of section 19, it is provided as follows:

"The city council shall have power to make such ordinances, by-laws, orders, and regulations as they may deem desirable to carry out the following powers, which are hereby invested in them":

* * * * *

"VII. To close or extend, widen or narrow, lay out and graduate, pave, and otherwise improve the streets and public alleys in the city, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city, which has been or may be ceded to the city like authority as over other streets or alleys. They may build bridges in and conduits under said streets, or authorize the construction of conduits, and annex conditions and restrictions to the construction, maintenance and use thereof and they may prevent or remove any structure, obstruction or encroachment over or under or in a street or alley or any sidewalk thereof, and may have shade trees planted along the said streets; and no company shall occupy with its works the streets of the city without the consent of the council. In the meantime, no order shall be made, and no injunction shall be awarded, by any court or judge, to stay the proceedings of the city in the prosecution of their works, unless it be manifest that they, their officers, agents, or servants are transcending the authority given by this act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages;

"VIII. To prevent the cumbering of streets, avenues, walks, public squares, lanes, alleys, or bridges in any manner whatever." (Richmond City Code, 1899, p. 18.)

It thus appears that the city was expressly authorized to exercise control in the matter of the occupancy of its streets and alleys but to make it clear that the right of telegraph companies to construct and maintain their poles and wires on and along the streets and alleys of the cities, was not intended to supercede and control, the statute, as before pointed out, specially providing that the grant should be effective only when the consent of the Council of the city has been obtained. (Code of Virginia 1887, sec. 1287.) Such were the plenary powers of the city of Richmond, when it enacted the ordinances embodied in chapter 88, to every section of which, the complainant objects in lamentations loud, long and oft-repeated, insisting in its final plaint, "that each and every section thereof, and all amendments thereto, and especially sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 25, 26, 27, 28, 29, 30, 31, 32 and 33 thereof, and the amendments to sections 27 and 28 are grossly unreasonable and illegal, and repugnant to the aforesaid provisions of the Constitution of the United States and amendments thereto, and the aforesaid acts of Congress and should therefore, be declared and decreed by this honorable court to be null and void." (Record p. 105.)

The appellant in its amended bill sets forth twenty-nine grounds of illegality in the ordinance of which it complains (Record pp. 75-107), and on taking this appeal to this court assigned twenty-four specific errors (Record, 303-305), while in the brief of counsel, all of its complaints are either abandoned or merged into *six*, which will be found set forth on page 6 of the brief filed by the attorneys for the appellant.

They are as follows:

"The grounds upon which it thus appeals to the court and wherein it deems its rights are infringed are:

"First. The ordinance does not impose definite rules for the guidance of the telegraph company in the operation of its business within the city, but exposes the operations of the company to the arbitrary discretion of the officers of the city without any definite rules to guide the officers in the discharge of their duties.

"Second. The ordinance imposes excessive fines and penalties for the failure to obey the arbitrary orders of the city offi-

cials in matters concerning which the company has no guide except the direction of these officers.

"Third. The ordinance requires the company to furnish to the city large and extensive facilities for the doing of the city's business without compensation or reward therefor, and such compulsion is not a legitimate exercise of the police power.

"Fourth. The ordinance respecting underground wires requires the company to construct property which may be available for others to use, and which it is not permitted to use without the consent of the city, and which may never be used.

"Fifth. The ordinance imposes illegal conditions, restrictions, expenses and burdens as conditions of the right to use the streets of the city of Richmond, which right is secured to the telegraph company by an act of Congress, subject only to the compliance with reasonable police regulations for the protection and convenience of the inhabitants of the city.

"Sixth. The ordinance seeks to put limits upon the right of the telegraph company to use the streets, and to require the abandonment of the use of the streets at the demand of the city, while the act of Congress secures to the telegraph company the full and unlimited right to use the streets subject only to fair and reasonable regulations by the city."

I beg to submit that none of these contentions should be sustained under the pleadings and evidence in this case, and to sustain this contention I will respond to the same in the order made.

FIRST

The ordinance complained of does impose rules sufficiently definite for the guidance of the appellant in the operation of its business, and does not expose its operations to the discretion of the officers of the City in any unreasonable degree.

By meeting the contentions of the appellant which relate to the several sections of the ordinance other than sections 27 and 28 I do not wish to be understood as conceding in the least the right of the appellant to call in question the validity of other sections, as it attempts to do in four out of six of its assignments of error now relied upon.

The reverse of the above proposition was strongly urged before the court below, and to that contention the learned judge made the following response:

"The requirements of section one, that the poles used by complainant shall be subject to the determination of the city engineer, as to size, number, location and manner of erection, does not deprive complainant of the right given it by the act of Congress of July 24, 1866, as all companies accepting the terms of that legislation do so, subject to the right of the State and municipalities therein, to regulate by reasonable rules, the manner in and by which the highways of the State, and the streets of the cities shall be so used. It will not do to hold that the companies shall themselves exclusively decide such matters, nor will the cities be permitted to dispose of them in such a way, as to render the rights granted by Congress inoperative. If the conditions imposed are unreasonable, and are intended to unnecessarily restrict, or to absolutely prevent such use of the post roads of the country, such regulations will be decreed to be inoperative and void. I see no objection to the designation of the city engineer as the party to decide such matters, and presumably his action will be fair and just to all the interests involved. When he acts unjustly, then his conduct can be complained of and reviewed." Record p. 294.

This deliverance of the court below is undoubtedly based upon reason and authority. The leading case which may be relied upon is the case of *Missouri v. Murphy*, 170 U. S. 78. In that case the Laclede Gas Light Company, suing in the name of the State of Missouri, applied for a mandamus against Murphy and others, street commissioners of the city of St. Louis, to compel them to allow said company to continue to dig up the streets of the city and to lay pipes therein, an ordinance of the city (approved April 7, 1893) to the contrary notwithstanding. The specific provisions of the ordinance referred to will be found in a note to the said case reported in 42 Law Ed. at bottom of page 958.

An examination of the ordinance brought under review in that case will show that, like the Richmond ordinance, it does not "define rules for the guidance" of the company owning and maintaining electrical wires in the city of St. Louis, but submits to a board denominated the "Board of Public Improvements," the right

to grant or refuse a permit on application being made by the company proposing to occupy the streets. By that ordinance, as by the one now objected to, it required the entering company "to file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured, supported and insulated, together with a plat showing the height of such wires, tubes or cables," and then provides in the next section that the board of public improvements should be authorized, upon the filing of the application and plat required to grant a permit for such occupancy of the streets, alleys and public places "with such restrictions, regulations and qualifications as may be prescribed by said board, *and under the supervision and to the satisfaction of the supervisor of city lighting.*" (The italics are mine.)

And again, by another section of the ordinance (Sec. 611), the right was reserved to the board of public improvements at any time to direct any alteration in the location of the poles, and also the height at which the wires, tubes and cables shall be run; and by section 612 it was provided that the person or corporation to whom the routes or privileges were granted, before commencing on the work, should file with the register an acceptance of the terms of the ordinance, together with a penal bond in the sum of twenty thousand dollars (\$20,000.00), conditioned that he or it will comply with all of the conditions of the ordinance or any ordinance which may hereafter be passed regulating the placing of wires, tubes and cables in the streets and alleys, for the purposes named therein, and will also comply with all regulations made by the board of public improvements with reference to the subject embraced in the ordinance, and by the next section providing that any person violating or failing to comply with any provision of the ordinance shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars, and by the last section of the ordinance it is expressly provided that "The city reserves the right to alter, amend or repeal this article at any time."

I apprehend that no claim can be made that the ordinance of the city of Richmond is more stringent than that of the city of St. Louis, which came under review in the case last above quoted.

Mr. Chief Justice Fuller, delivering the opinion of the court (170 U. S. 97), quoted from and approved the language used by the Supreme Court of Missouri, 130 Mo. 10, S. C. 31 L. R. A. 798, where it was said:

"Considering the danger to life and property from electric wires when charged, it seems to the court too plain for argument that the city should have the right to direct the manner in which their use should be exercised, and especially when more than one method was open, and the rights and safety of the public was more or less affected by either.

"Again many companies used electric wires for various purposes, and to accommodate them all and to prevent monopolies in the use of the streets it appeared absolutely necessary that the municipal authorities should have the right to direct the manner in which wires should be placed underground."

And the Chief Justice, referring to the decision of the Supreme Court of Missouri, which was affirmed, says:

"The court was of opinion that it would be time enough for the company to complain when its rights were distinctly infringed, and held that the street commissioner properly refused to grant the permit demanded unless the relator has complied with the requirements of the valid ordinance then in force."

Referring to the language so used the Chief Justice adds:

"Obviously, the Supreme Court declined to enter on a discussion as to what were and what were not valid ordinances as respected the company, because the record showed that the company denied that it was subject to any control by the municipal authorities, and claimed that all that was required of it by its charter was to do the work with as much dispatch and as little inconvenience as possible.

"It had made no application to the municipal assembly, directly or through the board of public improvements, for authority to proceed.

"It had not filed any application with the boards of public improvements, giving details of the streets it wished to occupy, and the manner in which the wires, &c., were to be secured, supported, and insulated, and a plat of the route; nor asked that board for a permit for the occupancy it desired.

"Whatever objections the company may have been entitled to raise to particular provisions of the ordinances, in denial of their applicability or validity, it took no action whatever, so far as this record shows, calculated to bring such matters to a distinct issue."

But even more pertinently, the Chief Justice further on in the opinion, said:

"We are unable to accede to the contention that the company was entitled, by contract with the State, to lay electric wires underground, without reference to the directions or regulations of the city on that subject; or that the street commissioner was obliged to permit it to excavate the streets for that purpose without the assent of the board of public improvements or of the municipal assembly, or effort to obtain either, on the mere averment of the company that it fears it might thereby subject itself to requirements from which it insists it was exempted by the terms of its charter.

"If the company, as it asserted, possessed the right to place electric wires beneath the surface of the streets that right was subject to such reasonable regulations as the city deemed best to make for the public safety and convenience, and the duty rested on the company to comply with them."

The appellant stakes its whole case upon its right to reject, repudiate and treat as void, every section of chapter 88. Before it brought its suit it had not offered to comply with a single provision of a single section of the ordinance. *Without such offer it has no standing in a court of equity.* In the case last quoted from this court said:

"If requirements were exacted or duties imposed by the ordinances which, if enforced, would have impaired the obligation of the company's contract, this did not relieve the company from offering to do those things which it was lawfully bound to do. The exemption of the company from requirements inconsistent with its charter could not operate to relieve it from submitting itself to such police regulations as the city might lawfully impose. And until it has complied, or offered to comply, with regulations to which it was bound to conform, it was not in a position to assert that its charter rights were invaded because of other regulations

which, though applicable to other companies, it contended would be invaded if applied to it."

(170 U. S. 99.)

A case no less pertinent is that of *Gundling v. Chicago*, 177 U. S. 183, where it was contended that the ordinance, which vested in the mayor the power to grant or refuse a license to sell cigarettes was void because of the arbitrary power thereby conferred upon the mayor.

Mr. Justice Peckham, at page 186, uses the following language:

"It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He made no application for a license, and of course the mayor has not refused it. *Non constat* that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license.

"But assuming that the question may be raised by him, we think the ordinance in question does not violate the Fourteenth Amendment, either in regard to the clause requiring due process of law, or in that providing for the equal protection of the laws.

"The case principally relied upon by the plaintiff in error is that of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064, relating to the regulation of laundries in the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination made against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and unjust. It appeared that both petitioners, who were engaged in the laundry business, were Chinese, and had complied with every requisite deemed by the law, or by the public officers

charged with its administration, necessary for the protection of the neighboring property from fire, or as a protection against injury to the public health, and yet the supervisors, for no reason other than discrimination against the Chinese, refuse to grant the licenses to the petitioners and to some 200 other Chinese subjects, while granting them to eighty people who were not such subjects and were working under precisely the same conditions. Such an ordinance, so executed, was held void by this court."

* * * * *

"The ordinance in question here does not grant to the mayor arbitrary power such as is described in the above mentioned laundry case, but the provision is similar to that mentioned in the foregoing extract from the opinion in that case. In the case at bar, the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, provided such appellant will file a bond as stated in the ordinance, as a security that he will faithfully observe and obey the laws of the State and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer and it calls for the exercise of a discretion of a judicial nature by him. There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor."

In this case, as in the one quoted from, (*Yick Wo v. Hopkins*, 118 U. S. 356), relied upon as a binding authority to sustain the general proposition contended for by the learned counsel for the appellant, the contention must be disposed of here as there, viz. on the ground that the class of legislation to which this particular ordinance belonged clearly demonstrated that the intent of the legislative body in making the delegation of power was to effectuate "race discrimination."

In addition to what is stated in the foregoing opinion of Mr. Justice Peckham, as to the ground upon which the *Yick Wo* case rested and was decided, I beg to add the following language of Mr. Justice Matthews, delivering the opinion of the court in that case, on page 373, where he says:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

I beg to submit, therefore, that the analogy between the Yick Wo case, and the one at bar, is so slight as to entitle it to no weight as an authority for the contention of the appellant.

The same may be said of *Mayor of Baltimore v. Radecke*, 49 Md. 217.

In the case of *Fisher v. St. Louis*, 194 U. S. 361, 372, it was held that neither due process of law nor the equal protection of the laws is denied by a municipal ordinance adopted under legislative authority forbidding the establishment or maintenance of a dairy or cow stable within the city limits without having received permission so to do from the municipal assembly by a proper ordinance.

In that case, of the right to confer power of the nature here complained of upon a single individual, Mr. Justice Brown says:

"It has been held in some of the State courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual," citing a number of cases, among them four of the cases that are here relied upon by the appellant. The learned justice then proceeds: "But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority, (*Quincy v. Kennard*, 151 Mass. 563; *Commonwealth v. Davis*, 162 Mass. 510), and by this court the delegation of such power, even to a single individual, was sus-

tained in *Wilson v. Eureka City*, 173 U. S. 32, and *Gundling v. Chicago*, 177 U. S. 183."

The Gundling case has been already commented upon. In *Wilson v. Eureka City*, *supra*, it was held:

"That an ordinance requiring the written permission of the mayor or president of the city council, or, in his absence, of a councilor, before any person shall move a building on the streets, is not unconstitutional as a denial of the equal protection of the laws of due process of law."

In this case Mr. Justice McKenna, at page 37, referring to the authorities quoted by Mr. Justice McFarland, of the Supreme Court of California, in *Re Flaherty*, 105 Cal. 558 in which an ordinance that prohibited the beating of drums on the streets of one of the towns of that State "without special permit in writing so to do first had and obtained from the board of trustees" was sustained, says:

"In all of these cases the discretion upon which the right depended was not that of a single individual. It was not in all of the cases cited by plaintiff in error, nor was their principle based on that. It was based on the necessity of the regulation of rights by uniform and general laws—a necessity which is no better observed by a discretion in the board of aldermen or council of a city than in a mayor, and the cases, therefore, are authority, against the contention of the plaintiff in error. Besides it is opposed by *Davis v. Massachusetts*, 167 U. S. 43."

In the case cited by Mr. Justice McKenna an ordinance prohibiting any person from making a public address on public grounds of the city of Boston, without a permit from the mayor, was sustained as not in violation of the Fourteenth Amendment to the Constitution of the United States.

The case of *ex parte Kollock*, 165 U. S. 526, is in point. In that case the commissioner of internal revenue, with the approval of the secretary of the treasury, was authorized to prescribe particular marks, stamps and brands which retail dealers in oleomargarine put upon packages thereof and imposing a penalty for the violation of such rules and regulations. It was held that the

conferring of this power was not an unlawful delegation of authority on the commissioner, Mr. Chief Justice Fuller saying:

"The designation of the stamps, marks and brands is merely in the discharge of an administrative function and falls with the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer."

Specially pertinent is the case of *Libermon v. Van De Carr*, 109 U. S. 552, where the conflict of authority is referred to and where the court sustains the contention hereinbefore made.

The most recent case which has come under observation is *United States v. Grimaud*, 220 U. S. 506, in which Mr. Justice Lamar, delivering the opinion of the court, quotes with approval from the opinion of the court in *Marshall Field v. Clark*, 143 U. S. 694, where it was said:

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation," citing many cases to sustain the correctness of this deliverance of the court and adding and commenting upon the holding of the Supreme Court of Massachusetts in the following language, found on page 520:

"In *Brodline v. Revere*, 182 Mass. 599, a boulevard and park board was given authority to make rules and regulations for the control and government of the roadways under its care. It was there held that the provision in the act breaches of the rules thus made should be breaches of the peace, punishable in any court having jurisdiction, was not a delegation of legislative power which was unconstitutional. The court called attention to the fact that the punishment was not fixed by the board, saying that the making of the rules was administrative, while the substantive legislation was in the statute, which provided that they should be punished as breaches of the peace."

Applying these fundamental principles to the situation in the case at bar, I beg to ask the question how would it be possible by any general rule to determine in advance "the size, quality, character, number, location, appearance, and manner of erection" of a thousand or more poles, some located in congested portions of the city and others in sparsely populated communities; some in business sections and others in residential sections; some carrying only one wire and others fifty or more wires; some carrying high voltage wires and others harmless currents, while others may carry some of each kind of wires; some erected in sections of high buildings and others among inconspicuous buildings? To ask these questions is to answer them against the contention of appellant.

It may be true, as indicated in one of the opinions of this honorable court, hereinbefore commented upon, that there are opposing authorities to the line of authorities relied upon by the appellee, in a number of the States, but in reference thereto it may be said, I think, with the utmost deference that some of the tribunals of the State of last resort have been slow to follow the lead of this honorable court in amplifying the domain to which the police power may extend and in applying its doctrines to the subjects which it may control.

Since the great case of *Gibbons v. Ogden*, 9 Wheaton 1, 203, in which the great chief justice laid down fundamental principles, which have never been departed from, relative to the domain of Federal and State legislation, this honorable court has spoken with no uncertain sound in maintaining the right of the States to enforce police regulations of the most far-reaching kind. In that case, speaking of inspection laws passed by the States, the chief justice said:

"They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the general government—all of which can be most advantageously administered by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts. No direct general power over these objects is granted to Congress, and consequently they remain subject to State legislation."

This quotation from the great Chief Justice was brought forward and reiterated in the scarcely less celebrated case—the Slaughter-House Case, 16 Wallace, 36, 63, by Mr. Justice Miller, another jurist of scarcely less eminence than the great Chief Justice.

There is another conclusive reason, however, to be brought to the attention of the court why the contention of the appellant that the supervision of the city engineer in the matter of the erection and maintenance of its poles and wires was not an improper delegation of power, in this—that the appellant itself, as set forth in the statement of the case hereinbefore made, entered upon and occupied the streets of the city of Richmond under a contract embodied in a resolution of the council approved January 5, 1882, which provided that its poles should be erected inside of the curb-stone “and with as little interruption to travel and traffic as possible, and *under the general supervision and control of the city engineer*” (Record pp. 71-72). By the same resolution, it was further stipulated that the privileges granted thereby “shall be revocable by two successively elected councils,” from which it necessarily follows that, if it be true, as alleged in the complainant’s amended bill (Record p. 28), that to submit its plans to the committee on streets for permission to exercise its privileges on the streets of the city, under chapter 88. would be to subject itself to all the restrictions, regulations, conditions and limitations of that chapter, it must be likewise true that the complainant has already, by entering upon and enjoying the privileges granted it under the said resolution, contracted that its poles should be subject to the supervision of the city engineer, and has also already agreed that the privileges granted by said resolution should be revocable by two successively elected councils.

The record shows that the council of the city of Richmond, by the ordinance approved March 15, 1902. (being sec. 27 of chapter 88, as amended) and the ordinance approved December 18, 1903, (being section 28 of said chapter, as amended—Record pp. 124-7), requiring that all poles and wires used in connection with the transmission of electricity be removed from certain designated streets (the underground territory) and placed in conduits and as to all other poles and wires in the city, it was provided by section 2 (being section 2 of chapter 88) that they might remain on the streets

only on the terms and conditions set forth in the subsequent sections (Record, 108-9). By this means, inasmuch as the complainant has never complied with either of these requirements, or with any other requirements of the chapter, *the franchise rights of the complainant stand repealed, the council having exercised the right expressly reserved in the franchise to repeal the same at its "pleasure."* (R. p. 59.)

If authority be needed for a proposition so clear, it can be found in the famous case of the *Southern Bell Telephone and Telegraph Co. v. City of Richmond*, 98 Fed. 671, where his Honor, Judge Goff, presiding in this court said:

"The complainant accepted the terms of the ordinance giving said consent, and erected its line along and over the streets of the City of Richmond under the provision of the same. Having agreed with the city, for reasons of its own, as to the terms, conditions, and restrictions of said ordinance, and having for years acquiesced in the same, complainant should not now be permitted to either deny its validity or escape its requirements. The city of Richmond, exercising the right of repeal reserved by it, on the 14th day of December, 1894, repealed the ordinance of June 26, 1884, granting the right of way throughout the city to the Southern Bell Telephone and Telegraph Company, such repeal to take effect twelve months thereafter. Consequently, the complainant, on and after the 14th day of December, 1895, had, under the laws of Virginia and the ordinance of the city of Richmond, no legal right to occupy the streets of that city and use the same for its poles and wires.

"This court is not to pass upon the propriety of the ordinance of repeal, for the power of repeal does not depend on either the necessity for it nor on the soundness of the reasons assigned for it."

But this holding not being satisfactory to the company, an appeal was taken to the Circuit Court of Appeals, where the same was affirmed, the court there saying through Simonton, Judge:

"When the Southern Bell Telephone and Telegraph Company applied to the city council of Richmond for its consent to the construction, maintenance and operation of its line in the streets and alleys of that city, the ordinance of 1884 was passed. This ordinance gave the consent desired, and ex-

pressed the terms on which such consent was granted. It is in five sections and each section specifies the conditions on which the consent is given. These conditions were accepted by the telephone company in the most direct and satisfactory way. The company acted upon them, and under the ordinance, constructed, maintained and operated its line. No question is made as to the first four conditions. The fifth is in these words: 'This ordinance may at any time be repealed by the council of the city of Richmond.' Then are added words which are clearly a concession to the company: 'Such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law.' Under the act of the General Assembly, the council could consent or refuse. It states to the company the terms on which it will give its consent. These terms were accepted by the company, and the ordinance discloses the contract between them. If the terms were distasteful to the company it could have refused them, or, at least, protested against them. It is contended that under the act of the legislature the city council could give only a categorical answer to the request for its consent, 'Yes' or 'No,' without terms or conditions. But as the act itself expresses no regulations to be observed by a telegraph or telephone company in its use of the streets or alleys of a municipality, although it had done this as to the use of county or State roads, etc., clearly in referring such a company to a municipal council, it was intended that the council could state the proper measures for protecting the streets, alleys and the public. Especially is this so when the consent must be obtained not only to construct, but to maintain and operate the lines. Again it is contended that under the provisions of the act of Assembly the city council of Richmond had authority only to consent or refuse permission to the Southern Bell Telephone and Telegraph Company to construct, maintain and operate its line in that city, and that such consent or refusal must have been given without any qualification or condition whatever. It must have been a categorical 'Yes' or 'No.' But the city council did, in fact, express conditions and qualifications in giving its consent. It may safely be assumed that, without such qualifications and conditions, consent would not have been given; that they were the reasons and motive cause for the consent. Then if the city council could not have given—had no authority to give—a conditional or qualified consent, its attempt to consent was unauthorized, *ultra vires*, and void, and in fact, it never had consented in the only way in which complainants maintain it could consent. From this point of view, the condition pre-

cedent of the act of the General Assembly has not been performed. In order to maintain and operate its line in Richmond, the telephone company is without the consent of the council, and must obtain it. We see no error in the judgment of the Circuit Court. Its decree is affirmed."

103 Fed. 31-38.

These decisions are entitled to far more than ordinary weight, for two obvious reasons;

(1) Because under the mandate of the Supreme Court to which the case had been appealed, the court was inquiring *what rights*, if any, the Southern Bell Telephone & Telegraph Company had under the statutes of the State or ordinances of the city to occupy the streets and alleys of the city with its poles and wires. (*City of Richmond v. So. Bell Tele. & Telegraph Co.*, 174 U. S. 761, 777.)

(2) Because they are an express construction of the particular ordinances, the validity of which are called in question, in that case. But more, it can scarcely be a mere coincident, that the same counsel in that suit are the counsel here, or that substantially all of the charges and allegations of the bills of complaint in this case, are *mutatis mutandis*, copies of the charges and allegations in that case, as the files and records of this court will show.

If additional or higher authority be demanded to sustain the contention that the complainant has contracted with the city that its franchise may be repealed, and that it is bound by such repeal, when made, it is at hand:

In the recent, and very valuable work of McQuillin on Municipal Ordinances, it is laid down that "the right to alter, amend or repeal is usually reserved by the State or municipality in the act granting the right or privilege, and when the franchise is accepted by the individual or corporation the reservation becomes a part of the contract and the franchise may be amended by subsequent legislation." McQuillin on Municipal Ordinances, Section 197.

In *Greenwood v. Freight Co.*, 105 U. S., 13, it appears that the Legislature of Massachusetts had by statute created a street railroad company. At the time of the passage of that special statute there existed also a general statute, reserving the right to amend,

alter, or repeal, at the pleasure of the Legislature, every act of incorporation passed by it. The legislature repealed the special statute, and the question arose as to what was the effect of that repeal. The Supreme Court held:

"Such an act may be amended—that is, it may be changed by additions to its terms, or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it that may be repealed? Is it the act of incorporation? Is it the organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law, &c., &c. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it," &c.

And again, on pages 18 and 19, it says:

"One obvious effect of the repeal of the statute is that it no longer exists. Its life is at end. * * * If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights."

In *Miller v. State*, 15 Wallace, 478, it was said:

"The State has power to revoke its contracts where it has, in making them, reserved such right."

In the case of *Hopkins v. U. S.*, 171 U. S. 578-602, it was said:

"We say nothing against the constitutional right of each one of the defendants, and each person doing business at the Kansas City Stock Yards, to send into distant States and Territories as many solicitors as the business of each will warrant. This original right is not denied or questioned. But cannot the citizen, for what he thinks good reason, contract or curtail

that right? To say that a State would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conducive to their own interests. What a State may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing.

The liberty of contract as referred to in *Allgeyer v. Louisiana*, 165 U. S. 578 (41-832), is the liberty of the individual to be free, under certain circumstances, from the restraint of legislative control with regard to all his contracts, but the case has no reference to the right of individuals to sometimes enter into those voluntary contracts by which their rights and duties may properly be measured and defined, and in many cases greatly restrained and limited."

In the case of *Ashley v. Ryan*, 153 U. S. 436, it was held that,—

"A State, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation, organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise implies a submission to the conditions without which the franchise could not have been obtained."

And in the opinion of the court, by Mr. Justice White, at page 441, it was said:

"As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the State law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence would not have been procured. We say *voluntary* assumption, because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right

granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought."

* * * * *

"We say voluntary assumption because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of a claim for corporate existence. *Having thus accepted the act of grace of the State, and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought.*"

See also *New York Co. v. Bristol*, 151 U. S. 556, 557, and *Chicago v. Nebraska*, 170 U. S. 57, 72.

I, therefore, submit that the delegation of power to the city engineer to determine "the size, quality, character, number, location, condition, appearance, and manner of erection of such poles, wires, or other apparatus," is not an unlawful delegation of power.

SECOND

The ordinance does not impose excessive fines and penalties for a failure to conform to its requirements.

In *ex parte Young*, 209 U. S. 123, referred to in the brief of opposing counsel, the following is laid down as the true test by which must be determined the invalidity of a statute by reason of its imposing excessive fines and penalties:

"We hold, therefore, that provisions of the acts relating to the enforcement of rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the laws themselves, are unconstitutional on their face, without regard to the question of the sufficiency of those rates."

It is confidently submitted that section 26 of the ordinance (Record p. 40), relied on by the appellant as imposing illegal fines and penalties does not impose fines and penalties at all commensurate with those described by the court, or such as to render it illegal. It cannot be said, I think, of the imposition of a fine of not less than ten nor more than five hundred dollars, each day's violation or failure to be a separate offense *without any imprisonment whatever*, is excessive, nor can it be characterized as "enormous," or as intended to prevent an effort being made to test the validity of the ordinance.

But a further examination of Mr. Justice Peckham's opinion will show that the holding of the court was justified more by the energetic and persistent efforts of the State officers to compel a compliance with the rates, believed by the company to be confiscatory of its property, than on the size of the fine, the learned justice saying that the record discloses "an intention by the attorney-general of the State to enforce its provisions, to the injury of the company, compelling it, at great expense, to defend legal proceedings of a complicated and unusual character and involving questions of vast importance to all employees and officers of the company, as well as to the company itself."

The other case referred to in the brief of counsel, on page 28, is *Cotting v. Goodord*, 183 U. S. 79, where the fines and penalties imposed against the offending person or corporation were a punishment "for the first offense of not more than \$100, for the second offense of not less than \$100 nor more than \$200, for the third offense not less than \$200 nor more than \$500, and imprisonment in the county jail not exceeding six months, and for each subsequent offense a fine of not less than \$1,000 and imprisonment not less than six months." (p. 92.)

The court makes this significant statement, that if the construction they were inclined to put upon the ordinance was correct, "as after the third offense the fine would not be less than \$1,000, for each offense, a single day's penalties would aggregate at least \$15,000,000."

An examination, therefore, of the authorities relied on I confidently submit, do not sustain the contention of the appellant in this case, that the excessiveness of the fines and penalties will justify the court in declaring the ordinance invalid.

But be it further said that the record here shows that although the ordinance complained of did become effective on December 10, 1885 (Record p. 35), yet no movement was made to compel a compliance with its provisions until the final decision of the case of the *Southern Bell Telephone Co. v. City of Richmond*, which challenged the legality of the same and which was finally ended by an order of this court made November 7, 1901, dismissing the appeal taken by the company from the decision of the Circuit Court of Appeals reported in 103 Federal 31, which decision is hereinbefore commented upon. Waiting several years after the validity of the ordinance had been thus fully vindicated, and after amending sections 27 and 28, in 1902 and 1903, respectively, (Record pp. 124-5), by the latter of which sections the surplus space in the conduits was reduced from 100 per cent to 30 per cent., namely, until 1904, the appellant was notified that it would then be required, under the penalties prescribed in said ordinance, to proceed within a reasonable time to file plans and specifications for the installation of their overhead wires within the underground territory and to remove its poles from the streets in said territory. Immediately upon the receipt of this notice this long drawn out litigation was commenced. (Record p. 49.)

I submit that the court will find no difficulty whatever in differentiating the situation here, as to the amount of the fines and as to the intent and conduct of the city officials, from the excessive fines and penalties imposed and the conduct of the officers concerned in the two cases relied on by the appellant to sustain its contention.

The THIRD and FOURTH contentions of the learned counsel for the appellant are so intimately connected as to render it practically impossible to examine them separately. I therefore, ask the indulgence of the court to consider these under one head.

THIRD

The requirements of the ordinance that the city shall have the right, through the Board of Fire Commissioners, to run city wires needed for the Fire Alarm and Police Telegraph Departments on Appellant's poles, and that its conduits shall contain one duct for the accommodation of similar city wires are not unreasonable and oppressive, so as to render the said requirements invalid.

It may be said in a general way that where an ordinance is enacted in pursuance of express authority that the courts are powerless to investigate the question of the unreasonableness of the ordinance, while on the other hand, where the ordinance is enacted in pursuance of an incidental or implied power the same must be reasonable.

These doctrines are thus respectively stated by Judge Dillon in his work on Municipal Corporations (5th Ed.) in sections 586 and 600:

"Sec. 589. (253). *Must be Reasonable and Lawful.*—In England, the subjects upon which by-laws may be made were not usually specified in the King's Charter, and it became an established doctrine of the courts that every corporation had the implied or incidental power to pass by-laws; but this power was accompanied with these limitations, namely, that *every by-law must be reasonable*, and not inconsistent with any statute of Parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property. In this country the courts have often affirmed the general incidental power of municipal corporations to make ordinances but have always declared that ordinances passed by virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State."

"Sec. 600. (262.) *Legislative Authority to Adopt What Would Otherwise be Unreasonable Ordinances.*—Where the legislature, in terms, confer upon a municipal corporation the

power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words what the legislature distinctively says may be done cannot be set aside by the courts, because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." Dillon on Municipal Corporations, sections 589, 600 (5th Ed.)

Mr. McQuillin in his work on Municipal Ordinances, in sections 181 and 186 states the doctrine as follows:

"Sec. 181. Express Power to Pass.—Ordinances may be passed, first, by virtue of express grant of power; second, under a grant of power general in its nature; or, third, under incidental or implied municipal powers. Where passed by virtue of express power, not inconsistent with the Federal Constitution or laws, or the State Constitution, and such power is substantially followed, or is exercised in a reasonable manner, the ordinance will be sustained, regardless of the opinion of the court respecting its reasonableness. 'Where the power to enact the particular ordinance is specifically conferred on the municipality, the question whether it is reasonable can no more be raised so as to affect its validity than could the same objection be raised against the statute so as to affect its validity.' 'The power of a court to declare an ordinance unreasonable and, therefore void, is practically restricted to cases in which the legislature has enacted nothing on the subject matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed incidental power of the corporation merely.'" McQuillin on Municipal Ordinances, Section 181, where many cases are cited.

"Sec. 186. Judicial Power to Declare an Ordinance Unreasonable is a Power to be Cautiously Exercised.—The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances, and hence the legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence."

To the same effect is section 649 of 2 Dillon on Mun. Corps. (5th Ed.), where it is laid down:

"It will be presumed that an ordinance is valid, and the burden to establish invalidity is on the person asserting it."

This is the doctrine firmly established in Virginia as will be seen by reference to:

Danville v. Hatcher, 101 Va. 253;

Norfolk P. & N. N. Co. v. Norfolk, 105 Va. 139, and by numerous cases in this court, among them, *Western Union T. & T. v. New Hope*, 187 U. S. 419.

(1) With reference to the first of these contentions the learned judge in the court below says:

"Section 6 in reserving to the board of fire commissioners the right to run such wires as are needed for the fire alarm and the police telegraph departments of the city of Richmond, on the poles erected or allowed under the ordinances mentioned, is a wise provision, beneficial to the public, not burdensome to the complainant, and makes unnecessary the erection of additional poles on crowded streets for those purposes." (Record, 295.)

And on the other provision, the reasonableness of which is now under consideration, the learned judge says:

"I think the complainant is shown by the record to be unreasonably apprehensive of the result that will follow the enforcement of these sections. Their provisions apply to all alike, are not peculiar to the city of Richmond, but are found in the enactments of most of the cities of the United States. At one time not necessary they are now absolutely essential, and not only is the convenience and safety of the public subserved by them, but also do they protect the interests and facilitate the business of the complainant. It is to be regretted that their enforcement will cause trouble and expense to the complainant, as it will also to the defendant, but that is no reason why they should not be respected, nor does that make them unreasonably burdensome. In fact the evidence taken and the case submitted, discloses no effort on the part of the

defendant to discriminate against the complainant, to impose upon it unnecessary restrictions, to regulate it by unreasonable provisions, or to cause it to pay excessive charges for its privileges."

Could language be more apposite or more conservative? Emanating, as it does, from a judge of marked ability, experience and practical knowledge of affairs.

These requirements, as said by the learned judge, "are those ordinarily existing and imposed upon companies maintaining poles, conduits and wires upon and under the streets of municipalities." Of which fact the court properly took judicial cognizance. The requirements were not specially directed against appellant, but were expressly applied alike to all persons or corporations maintaining electrical wires over and under the streets of the city.

In the case of *Elec. Imp. Co. v. San Francisco*, 45 Fed. 593, 595, recognizing the validity of an analagous ordinance, the court, by Mr. Justice Sawyer, circuit judge, said:

"In *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, and *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730, the court distinctly held, upon a much milder case of danger than this, that the Fourteenth Amendment in no respect interferes with, or limits the exercise of this police power. The exercise of no other branch of this power is more important than that, which protects, or seeks to protect, the public safety of a great city, like San Francisco. That the stretching of these wires over the buildings in the manner practiced, as shown by the evidence, no one, I think, can doubt, after reading the affidavits, is extremely dangerous, both as being liable to originate fires, and as obstructions to the extinguishment of fires otherwise originated. Indeed the danger is a matter of common knowledge. We might also as well require strict proof of the danger of storing gunpowder, or dynamite, in, under, upon, or about our houses. Even if these wires can be so put up and insulated as to be safe, in the mode suggested by one of complainant's witnesses, Prof. Keith, it has not been done. The professor himself does not claim they are now safe. The danger is of a character cognate to that of gunpowder. There is, doubtless, a difference in the degree of that danger, but the consequences are liable to be

far more widespread and calamitous. Should a raging fire occur, originated by the electric current, or otherwise, these dangerous wires might so obstruct the efforts of the firemen to extinguish it, as to result in the destruction of the entire city. It is certainly competent under the police powers of the State, to suppress such dangerous erections, in the interest of the common safety of the community."

* * * * *

"The only wonder is that owners of buildings in view of the recognized danger, will permit their use for such purposes. True, the supervisors cannot make an article dangerous, by simply declaring it to be so, when in fact, it is not. But the practice, as it now prevails against which this ordinance is directed, is shown to be dangerous, and, we, ourselves, all know it to be so. There can be no successful disputing of the fact. The order is general and applicable to all. If it is not enforced as to all, it ought to be, and the Chief of Police declares his purpose to enforce it, in all cases that come to his notice. I see no good reason to believe that it was passed for the purpose of discrimination in favor of another company, as claimed, or that it is intended to be so conferred. I do not think it violates any provision of the National Constitution."

We have no quarrel with opposing counsel over the numerous authorities cited in their brief, on pages 33 to 41, inclusive, except to say that, if the holding of the cases there cited were intended to overrule or in the least modify the holdings of the Federal courts in the cases to be referred to under the next head of this brief, then they are ineffective and of no binding force upon this court. For from the case of *Western Union Telegraph Co. v. Mayor of New York*, 38 Fed. 552, S. C., 3 L. R. A. 449 (decided in 1888) to the case of *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64 (decided in 1904), the cases have determined that although telegraph companies are engaged in interstate commerce, yet municipalities in which they occupy the streets, may require a fee or charge sufficient to cover any reasonably anticipated expenses incident to the proper inspection and supervision of their conduits, poles and wires, as well as a charge in the nature of a rental for the use of the street occupied by the same.

An effort was made by the appellant to show by the evidence that the additional expense required for the occupancy by the fire alarm and police telegraph wires of the city would entail an enormous expense upon the company, and in order to swell this expense they were driven to the necessity of attempting to show that instead of the *ordinary vitrified or burnt clay combined conduit tubes or ducts*, that *steel tubes* should be used (Record 160, 161, 182, 183). it being claimed by appellant's witnesses that steel ducts were generally in use, and were much more preferable than *terra cotta* or burnt clay, while it was clearly shown by the city, by its City Electrician and Superintendent of the Fire Alarm and Police Telegraph (W. H. Thompson), a man who had occupied this position for 22 years, at one time president of the International Association of Municipal Electricians, and, at the present time, a member of the Executive Committee of said Association (Record, 205-6), that vitrified brick conduits are the best and most generally used, and not steel tubes, as claimed by the appellant, and in his evidence he made the following quotation from the 10th Annual Report of the International Association of Municipal Electricians, found on page 58 of said report:

"The vitrified clay conduit is the most used and it is the best practice for all purposes. The method generally employed is to lay a four inch foundation of concrete, then the ducts, carefully aligned, then three or four inches of concrete above and around to afford protection from mechanical injury. There should be a fall of one foot in two hundred and fifty, so that no water will remain in the conduit." (Record p. 217).

See p. 569.

This witness distinctly states that the vitrified clay conduit is the cheapest and the best. But admit for the sake of the argument that steel conduits or tubes are better than vitrified clay. The standard of reasonableness is not to be measured by the best than can be procured, but by what is generally in use. It may be, and doubtless is true, that aluminum tubes, by reason of the non-corrosive quality of the metal, would be better than steel, but yet to install aluminum tubes would cost a fortune.

The furnishings of positions for certain city wires on the poles and in the ducts of every electrical company using the streets of the city, was undoubtedly intended to be a part of the charge for the use of the streets by said companies.

Referring further to the impracticability of the use of steel conduits, as contended for by the appellant, this witness, in answer to a question calling for his opinion as to the comparatively advantages of the terra-cotta conduit over the steel conduit, for the carrying of underground electrical wires, used the following language:

"A. Speaking from my eighteen years' experience with iron, which I have had in practical use for that period, I would say it was all out of the question of thinking of using iron or steel in the present day. Terra-cotta is much superior to it. Iron deteriorates very fast, and in a very few years it is entirely eaten away. Besides it is subjected to electrolytic action, and liable to be eaten up from this source, as well as the salt and acids of the earth, while terra-cotta is not subjected to those difficulties." (Record p. 262).

To meet not only the inspection and supervision of the poles, wires, ducts, man-holes and other construction in connection with the maintenance of electrical wires, but also what was held in the case of *Western Union v. St. Louis*, 148 U. S. 92, to be a legitimate charge, namely, a fair rental for the part of the street occupied by such constructions, the court, in this connection, saying, on page 101:

"It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

Thus overruling the contention made in that case as in this case, that the appellant being engaged in interstate commerce, could not be required to make compensation to the State or city having the control of the public property, as the case may be, adding:

"This is not the first time that an effort has been made to withdraw corporate property from State control, under and by authority of this Act of Congress."

Probably the soundness of no two decisions of this Honorable Court have ever been so continuously and persistently combated as its deliverances in the cases of *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92 and *St. Louis v. Western Union Telegraph Company*, 149 U. S. 465. The appellant, losing in both of these cases, has again and again, in every court, State and Federal, of high and low degree, brought under review the principles there distinctly settled.

In these cases one of the questions which arose was the validity of the provision in the ordinances of the City of St. Louis, denominated as ordinance No. 11,602, which brought under review the reasonableness of the requirement to give the City of St. Louis the use of space upon the telegraph poles of the telegraph company and the requirement was held to be valid.

In the case of *Postal Telegraph-Cable Co. v. Chicapee*, 207 Mass. 341, S. C. 93 N. E., 927, (decided in 1911) which required a telephone company, as a condition to receiving a license, to place poles on a city street, to permit the municipality to use them to carry its fire alarm and electric light wires without compensation, it was held that this was not unreasonable where the benefit to the municipality does not exceed the cost of inspecting the poles to keep them safe from travellers, and the risk it runs of being held liable for them for injuries, because of the presence of the poles in the street; and it is immaterial that the high current of the light wires renders greater care necessary on the part of employees at work upon the poles, and makes possible inductive disturbance in the telephone line, which may require its owner to maintain a higher voltage than it otherwise would.

And it was also held that it was not unreasonable interference with interstate commerce to require a *telegraph company*, as a condition to receiving a license to place poles to carry its wires in the city streets, to permit the city to place on the poles, without compensation, wires necessary for its fire alarm and electric lighting systems, where the detriment to the telegraph company is no

greater than the reasonable cost of inspecting the poles necessary to keep the streets safe for travellers.

In this case it was said by Knowlton, Chief Justice, delivering the opinion of a unanimous court:

"If these requirements of the ordinance were not unreasonable or invalid, under the statutes of this Commonwealth, it follows almost necessarily that they were not an interference with interstate commerce. They were adopted in the exercise of the police power, in reference to a local matter of public importance, about which Congress had taken no action. In *Western Union Telegraph Co. v. Pendleton*, 122 U. S., 347-359, it was said that within the limitation that it does not encroach upon the free exercise of the powers vested in Congress by the Constitution, a State may undoubtedly make all necessary provisions with respect to the buildings, poles and wires of telegraph companies in its jurisdiction, which the comfort and convenience of the community may require.' A provision almost identical with that in the present case was upheld in *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92, and was assumed to be reasonable on the re-hearing of the case in 149 U. S. 465, and in the opinion in *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419. In the first of these cases an additional requirement of a money payment by the telegraph company to the city was upheld, on the ground that it was to be treated as rent for the 'absolute, permanent and exclusive appropriation' of space in the streets.

* * * * *

"It is well established that a police regulation of a State, affecting interstate commerce only indirectly, in a field which has not been occupied by congressional legislation, is not a regulation of such commerce within the implied prohibition of the Constitution of the United States. *Mississippi R. Commission v. Illinois C. R. Co.*, 203 U. S., 335; *Lake Shore and Michigan Southern R. Co. v. Ohio*, 173 U. S., 285-298. All that has been done by the defendant under this ordinance seems to have but a slight and incidental effect upon interstate commerce, through the imposition of a local regulation of the use of the streets, for the purpose, *primarily and principally*, of preventing the erection of unnecessary and objectionable poles to the obstruction of travel; and, *secondarily*, to provide compensation for the expense to the city for inspecting the line of telegraph for the protection of the public."

This case is also significant in that it also holds the requirement that a company maintaining poles and wires on the streets shall permit other companies, "if licensed by the city, to use its poles upon making compensation, and the city to use them for public purposes, without compensation, it does not follow that the plaintiff should have an injunction."

The case is also of further importance in that the learned Chief Justice, in his opinion, also says:

"The use of these poles by the city under these circumstances, for more than ten years, without objection or claim of compensation, will hardly permit the enforcement of the plaintiff's alleged equitable right against the defendant. There is much in the case to support the defendant's argument that there has been laches."

This declaration, founded as it is on a principle, is important, for in the case at bar the court sustained the defense of the city that long acquiescence by appellant in the requirement as to the charge of \$2 per pole per annum, estopped it from now complaining, the court below declaring; that it appeared

"From the record, that the complainant, uncomplainingly paid this charge for over twenty years preceding the institution of this suit, and it seems to me that such acquiescence should, unless other reasons than those assigned exist, estop it from complaining now, so far at least as such charge is concerned." (Record p. 299).

The same reasoning applies to the use by the city for many years, of the poles of the appellant for carrying the wires of the fire alarm and police telegraph departments of the city.

(2) Intimately connected with the immediate foregoing discussion is the question relating to the imposition of a charge of \$2 per annum upon the appellant, for each pole maintained by it upon the streets of the city, and therefore should be discussed under this general head.

It is not easy to define the exact attitude that the appellant now occupies in this litigation, for on page 4 of the brief of opposing counsel, it is said:

"The bill concedes to the fullest extent the right of the city to enact ordinances in the exercise of its police power and regulate the use of the streets and includes within the things which the city may lawfully do, the right, under proper restrictions and conditions, to require, in the congested portion of the city, the removal of the wires from overhead and placing them underground."

And continuing on page 5, it is said:

"The question which the telegraph company makes in this case, is as to the right of the city to impose such conditions as those in the ordinance in question. The sole question, is as to whether in the passage of this ordinance the city has restricted itself to the legitimate exercise of the police power or has exceeded the proper limits for such action."

Such are the admissions of the appellant's counsel, at practically the end of this litigation, whereas both in the original and amended bills, it is asserted in the most positive terms that by reason of the acceptance by it of the act of Congress, its right "to construct, maintain and operate its lines of telegraph over and along the streets and alleys of the defendant, the City of Richmond, *became vested, and the said grant is in full force and effect*, and your orator avers that *its right to construct, maintain and operate its said lines of telegraph over and along the streets and alleys of the defendant the City of Richmond is complete*;" (Record 9, 10, 84), and in conformity with these bold assertions, made in said original and amended bills, charges that each section of chapter 88, and all of the amendments thereto are "grossly unreasonable and illegal and repugnant to the aforesaid provisions of the Constitution of the United States, and the aforesaid acts of Congress, and should therefore be declared and decreed by this honorable court to be null and void;" (Record 26, 27, 106), while on page 13 of the brief there seems to be a positive lapse from the gracious admissions in the preceding part of the brief, the following language being there used:

"The Western Union Telegraph Company, under the grants of the act of Congress of July 24, 1866, *has the unrestricted right to carry on its business in any streets of the*

City of Richmond, and it is, therefore, even less subject to molestation than the complainant in that case, (the case just before cited) by reason of the control of individuals whose discretion is, of necessity more or less arbitrary and sure to result in a violation of the rights of the telegraph company in the performance of its business of transmitting messages between citizens of the different States."

The only possible solution of these contradictory attitudes is that *the appellant believes that it should be the sole judge of what are reasonable regulations for the conduct of its business, or that said question shall be submitted to the court for its adjudication.* This was evidently the view taken by the learned judge of the court below, of its attitude, for in his opinion, he says:

"The courts will not undertake to make reasonable regulations under which the business of complainant may be conducted in the City of Richmond, but will, in a proper case, when that city has duly enacted such rules, determine whether or not they are reasonable." (Record p. 297.)

Necessarily connected with the specific question to be discussed under this heading is the question of the effect of the act of Congress, upon the rights of the State, or city, to who is delegated the right to control the streets.

Since the case of the *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, there ought to be no question as to the nature of the act of Congress. In that case Mr. Justice Miller, at page 548, speaking for the court, uses the following language:

"This, however, is mere a *permissive statute*. * * * It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

This language and this holding has been expressly reiterated and affirmed in each of the decisions of this court in *St. Louis v. Western Union Telegraph Company*, and in practically every other

case in this court, in the ablest of the State courts, and in the inferior Federal courts.

The same contention, made in the case of the *American R. T. Co. v. Hess*, 125 N. Y. 641, was answered as follows:

"The plaintiff seeks to strengthen its position in reference to the use of the streets of the City of New York, under the laws of the United States, to which we will make brief reference. It is provided in section 5263 of the Revised Statutes of the United States that "any telegraph company now organized, or which may be hereafter organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been, or may, hereafter be, declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, and interfere with the ordinary travel on such military or post roads." Section 5268 provides that: "before any telegraph company shall exercise any of the powers or privileges conferred by law, such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law." Section 3864 provides that all the letter carrier routes established in any city or town for the collection and delivery of mail matter are post roads, and by the act approved March 1st, 1884, it is enacted that "all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes." The plaintiff filed the written acceptance with the Postmaster-General, required by section 5268. The precise scope and range of operation of these sections within a State are not apparent, and cannot be easily defined. But this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the State except under the regulations prescribed for the control of all telegraph companies within the State, nor could such companies interfere with streets and highways in the State so as materially to impair their usefulness as ordinary highways. Nor, could these congressional acts deprive the State of its control over its highways, and its right to regulate their use, under the police power for the public welfare. The laws of Congress are perfectly satisfied by the permission granted to the plaintiff of

which it is perfectly feasible for it to avail itself, to place its electrical conductors in the subways constructed beneath the surface of the streets."

The case cited to sustain this clear cut statement was the leading case.

In that case (*St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465), twice before this honorable court, which, I apprehend, with counsel less resourceful than the able solicitors, one of whom then appeared for the telegraph company and who appeared for the appellant in the court below, and also appear here, would have been accepted as putting at rest practically every question presented by the pleadings in this case.

In this, the principal case, at page 469, it was said, on the very point:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordinations to public as to private rights. While a grant from one government may supercede and abridge franchises and rights held at the will of its granter, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal Government to a corporation, State or national, to construct interstate roads or line of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the National Government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the State-House grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the State-House grounds be property devoted to public uses, it is property devoted to the public uses

of the State, and property whose ownership and control are in the State, and it is not within the competency of the National Government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for purposes of travel and common use, they are open to citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of the National Government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may, if it chooses, exact from the party or corporation given such exclusive use, pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.

"This is not the first time that an effort has been made to withdraw corporate property from State control, under and by virtue of this act of Congress. In *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530, the telegraph company set up that act as a defence against State taxation, but the defense was overruled." *Western Union Telegraph Company v. St. Louis*, 148 U. S. 92, 100."

Referring to the last clause in the above quotation, I beg to say that the persistent and repeated presentation of this question, as to the scope and purpose of the act of Congress of July 24, 1866, which has been more than once fairly and squarely adjudicated, naturally excites a suspicion that the defendant company is amenable to some of the sins that it lays at the door of the City of Richmond, and is making resistance not with the hope of success, but for some other reason.

Judge Dillon in his latest work on Municipal Corporations, in section 1274, lays it down that:

"Statutory enactments and ordinances adopted pursuant to statutory authority which require overhead wires and elec-

trical conductors to be removed and placed underground are generally recognized as a proper exercise of the police power, and do not annul or violate the contract rights of companies holding franchises to use the streets for the purpose of maintaining such wires. Such statutes and ordinances are simply a regulation of the exercise of the franchise or privilege granted to the end that it shall be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible. But while the authority to require electrical conductors to be removed and placed underground may be delegated to cities and villages, such surrender of authority by the legislature is not to be implied, but must rest on legislation containing a clear grant of the power. In providing for the removal of overhead wires, the legislature may, by virtue of the police power, authorize the construction, and the city may by virtue of the power so conferred, build conduits in which all companies having the franchise or right to use the streets for electrical conductors shall be required to place their wires, and these companies may be denied the right to build independent conduits under their own charters, although the charters may be prior in point of time to the statutes or ordinances requiring the placing of the wires underground. And it is also within the legislative power to provide that the expense of constructing the conduits as well as the expenses of a commission appointed to carry out the provisions of the statute, shall be borne by the companies whose wires are to be placed in conduits. Such a statutory provision is not the exaction of a tax, but it is merely a regulation in the public interests of the manner in which the companies shall meet the expense of the necessary changes." (3 Dillon, 5th Ed.)

To sustain this proposition many cases are cited in the notes.

Among the most recent decisions in the Federal courts on this subject, sustaining the contention here made by the city of Richmond, are the following:

City of Memphis v. Postal Telegraph Cable Company, 145 Fed. 602. In that case the Tennessee act, as is done by the charter of the city of Richmond, provided that public streets within municipal corporations, should be for municipal purposes and the custody and control of the State therein was delegated to the municipality. The court held that this act conferred full power on the city to demand and receive compensation for the use of its street

by a telegraph company for the erection and maintenance of poles and wires therein, and further that the statute of the State authorizing telegraph companies to construct, operate and maintain their lines over and along the public highways and streets if the cities of the State "did not operate as a contractual franchise between the State and the telegraph company, and that such company seeking to maintain its poles and wires along the streets of a city could not do so without paying a rental therefor, if demanded by the city." To sustain these propositions the court cited the cases of—

St. Louis v. Western Union Telegraph Co., 148 U. S. 92;
Same v. Same, 149 U. S. 465;
Postal Telegraph Cable Co. v. Baltimore, 156 U. S. 210;
Western Union Tele. Co. v. Borough of New Hope, 187 U. S. 419;
Atlantic and Pac., etc., Co. v. Philadelphia, 190 U. S. 160;
Western Union Tel. Co. v. Penna. R. R. Co., 195 U. S. 566.

In the hearing and determination of that case Circuit Judges Lurton (now Mr. Justice Lurton of this court), and Richards, sat and concurred.

That case was remanded for a further hearing in the court below and came again to the Circuit Court of Appeals, and was again (November 9, 1908) passed upon by the Circuit Court of Appeals (164 Fed. 600.) On this hearing Circuit Judge, Richards. (Mr. Justice Lurton again sitting and concurring), in his opinion says:

"We have given careful consideration to the re-argument of the fundamental questions, whether the city had the authority to pass the ordinances of 1894 and 1902. and we are constrained to stand by the conclusions which is set out clearly and with sufficient authority in the opinion in 145 Fed. 602, 76 C. C. A. 292."

It is significant that in response to the inquiry "whether the rental of \$2.00 per pole per annum from 1896 to 1900, inclusive, and that of \$3.00 per pole per annum since 1902 were unreasonable and excessive," the Master held that both of these rentals were reasonable when laid, but held that the rental of \$2.00 per

pole was inadequate after the ordinance fixing the rental at \$3.00 per pole was passed. The trial court, however, overruled the Master and held that the rental of \$2.00 per pole was reasonable, and that the rental of \$3.00 per pole was unreasonable and excessive. To these different holdings the Circuit Court of Appeals said:

"We are clear in the opinion that it should be settled in favor of the conclusion reached by the Master. The increase of the rental under the second ordinance may well be justified by general conditions. What was a fair estimate of the rental per pole which should be charged per annum, under the circumstances, seems to have been a matter of opinion. The witnesses were not permitted to take into account any element of value resulting from the consideration that the occupation and use of the poles by the company was either a privilege or a license. This appears to have resulted from the fact that the right being exercised was proprietary in its nature, and for this right a rental should be charged. But at the same time that the witnesses were restricted in the way we have indicated, their attention was not directed to the fact that the proprietary right of the telegraph company was not restricted to the occupation and use of the ground where a pole stood merely; and you could not properly limit the value of that occupation and use by the size of the pole. The pole carried cross-arms, and the cross-arms insulators and wires. The cross-arms, insulators, wires and cables enjoy a part of the proprietary right of the company, as well as the poles.

In the face of the holding of the court in that case the appellant here has asked that an ordinance which imposes only \$2.00 per pole per annum in the city of Richmond, which, by the last United States census (of which the court may take judicial notice) has a population of 127,668, practically the same as that of Memphis with a population of 131,105, be set aside and annulled as unreasonable, although the courts, with one voice hold that in order to justify the invalidity of an ordinance imposing a burden of the kind complained of, on account of its being unreasonable, it must be shown that the same is so "grossly disproportionate to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure and not a

police regulation;" per Mr. Justice Peckham, in *Postal Telegraph Cable Co. v. Taylor*, 192 U. S. 64, 68, 69.

Another case of great significance in this controversy is the case of *Ganz v. Postal Telegraph Cable Company*, 140 Federal 692, in which Circuit Judge Richards, delivered the opinion of the court (Mr. Justice Lurton sitting and concurring.) The following holdings were there made:

"(a) The primary purposes of a highway being for travel and transportation, its use by a telegraph company to facilitate communication is subordinate to its use by the public for such primary purposes.

"(c) The right given to telegraph companies by the act of Congress to use post roads for their lines, on compliance with certain conditions, is permissive only and the statute was not intended to interfere with the proper control and regulation of highways by the States, counties or municipalities which have them in charge.

"(d) Under the statutes of Ohio, which provide that the use of a public road by a telegraph company 'shall not incommode the public in the use of such road' a board of county commissioners, which has been given control of a pike by the State, cannot grant to a telegraph company the right to maintain its poles and wires thereon, except subject to such statutory limitation; nor will such a grant preclude it or a succeeding board from ordering a removal of such poles and wires, if, at any time, through changed conditions, their location on the highway shall incommode the public in its use, and such action in ordering a removal will not be interfered with by the courts, unless an abuse of direction is shown."

In the opinion of the court, it is said:

"It is established by numerous decisions that the statute is permissive only. It was not intended by its passage to interfere with the proper control and regulation of such highways by the States, counties or municipalities which had them in charge."

Citing many cases already cited in this brief, and the following not heretofore cited:

Michigan Telegraph Co. v. Charlotte, 93 Fed. 11;
Toledo v. Western U. Telg. Co., 107 Fed. 10.

On another point, it was said:

"A location, not inconvenient when made, may become so because of changed conditions; and whether it has or not must be ascertained by the commissioners in office when the inquiry is made. No board has power to determine for all time just how a highway shall be used. The use may be changed as the new conditions demand." Citing many cases.

The controversy in that case arose from the right of commissioners to move the line of telegraph poles from the southern side of the turnpike, where a location had originally been given, to the north side. Of the right of the commissioners to determine the need and propriety of such change the court said:

"At any rate, this was a matter for the judgment of the commissioners. Having determined that the line in its present location seriously incommodes the public in the use of the pike, it was necessary, if the line was to be permitted to remain in the pike, to select another location. There is nothing in the record tending to show that there was any abuse of discretion in the selection of the north side.

And of the permanency of the location originally given, this significant language is used:

"This is but another phase of the argument that the telegraph company got a perpetual right to maintain its poles in the pike. *It never did get such a right.* The commissioners retained the power to regulate the use of the highway by quasi-public corporations, and might have required the appellees to remove its poles to the north side of the pike when it gave the electric railway company the right to build its road along or near the south side. * * * *The whole matter was within the reasonable control of the commissioners, and there is nothing in the record to justify the conclusion that they acted in a capricious or arbitrary manner or were guilty of an abuse of the discretion entrusted to them.*"

So holding, the judgment of the court below was reversed and the case was remanded with directions to dismiss the bill.

In passing it is to be remarked that the case last cited is a complete refutation of the insistence made by the appellant in its pleadings that the acceptance by it of the provisions of the act of Congress had *ipso facto* vested it with rights in the streets of the city of Richmond, of which it could not be deprived by the city, but apart from this, even if the complainant had the right to invade the streets of the city of Richmond by virtue of said acceptance and plant its poles where it pleased and string its wires thereon *ad libitum*, without regard to the statutes of the State or the ordinances of the city, why did it apply for and obtain the privileges granted it under the ordinances of July 16, 1881, and of January 5, 1882 (Record 59, 69-70.) In so doing it placed a construction upon the meaning and effect of the act of Congress which it cannot at this late day withdraw, for where parties have by long acquiescence accepted a certain construction of a statute and acted thereunder they will not be allowed afterwards to contend for a different construction. *Northrop v. Richmond*, 105 Va. 335, 339; *Va. Passenger and Power Co. v. Commonwealth*, 103 Va. 644, 649; *Chicago v. Selden*, 9 Wallace 50; *Topliff v. Topliff*, 122 U. S. 121; *Constable v. National Steamship Co.*, 154 U. S. 51, 94.

Turning again to the discussion of the reasonableness of the charges made against the appellant for the use of the city's streets, I point the court to the case of *Postal Telegraph Cable Company v. Baltimore*, 79 Md. 502, where the charge was \$5.00 per pole, appealed to this court and reported in 156 U. S. 210, Chief Justice Fuller made short work of the determination of the question, his opinion consisting of but one short sentence, he said:

"The judgment is affirmed upon the authority of *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92."

To persons other than the able and aggressive counsel for the appellant, it seems that the court had reached a point where it was thought that the questions presented by that record which are practically the same as those presented by this "*should be considered as settled.*"

Indeed the counsel who appeared for the company, (the Postal Telegraph Cable Company and not the Western Union Telegraph Company) as shown from a report of their contention before the

Supreme Court of Maryland, 39 L. R. A. 400, *admitted that the question was settled, unless it was true that the decision of the St. Louis case rested on the ground that the city of St. Louis had greater powers over its streets than ordinarily belong to municipalities*, but, as said, the court firmly and briefly rejected that suggestion and placed Baltimore, which, as the Record showed, had much narrower powers over its streets than did the city of St. Louis, on the same plane with that city.

It is laid down in 27 American and Eng. Ency. L., p. 1007, that:

"When the charter of the municipality or the laws of the State vest the entire control over the streets in the municipality where they lie, the municipal authorities may compel a telegraph or telephone company to pay a reasonable compensation, in the nature of rent, for the use of the streets."

And, again, at page 1021 it is laid down, that:

"THE MUNICIPALITY MAY PROVIDE FOR AN INSPECTION of the company's lines within its limits, and require it to pay, annually, a sum reasonably sufficient to cover the cost of such inspection by a municipal officer."

These propositions are, undoubtedly, sustained fully by the authorities. See *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465; *Postal Telegraph Cable Co. v. Baltimore*, 79 Md. 502, affirmed in 156 U. S. 210; *Allentown v. Western Union Telegraph Co.*, 148 Pa. St. 117; *Chester v. Western Union Telegraph Co.*, 154 Pa. St. 464, and *Western Union Telegraph Co. v. Philadelphia*, 12 Atl. 144."

In *Chester v. Western Union Telegraph Company*, *supra*, the Supreme Court of Pennsylvania declares that the reasonableness of a license fee for a telegraph company may be measured partly by the liability of a city for injuries caused by defective poles and wires as well as by the actual amount of expense for licenses.

In *Philadelphia v. American Union Telegraph Co.*, 167 Pa., 406, it was held that the fact that the charge was more than ten times the cost of regulation, and of all outstanding expenses, including liability for damages, loss and expenses of every nature, is not sufficient to defeat the right to collect the tax.

The New York Supreme Court refused to hold that the charge made by the Philadelphia ordinance for police regulation and supervision was unreasonable, and held that it did not constitute a restriction on interstate commerce. *Philadelphia v. Postal Telegraph Cable Company*, 67 Hun. 21.

While it is true that in the case of *Philadelphia v. Western Union Telegraph Co.*, 81 Fed. 948 and 82 Fed. 797, the Philadelphia ordinance was held invalid as unreasonable and in excess of the cost of inspection and regulation, yet, on writ of error from the Circuit Court of Appeals this judgment, was reversed because the lower court had refused to admit, upon the question of the reasonableness of the ordinance, evidence of the additional expense for fire apparatus rendered necessary by the suspension of electric wires in the streets, and of the necessity of extra meetings of the council for the purpose of regulating the suspension of poles and wires. *Philadelphia v. Western Union Telegraph Co.*, 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454. The court said that a wide scope should be given to the admission of evidence upon the question of the reasonableness of a license fee imposed by municipal ordinance upon poles and wires of a foreign telegraph company.

In *Western Union Telegraph Company v. New Hope*, 187 U. S. 419, it was held that:

"An ordinance imposing a license fee on telegraph poles and wires within the limits of the municipality is not obnoxious to the commerce clause of the Federal Constitution when applied to poles and wires used for interstate business, although it yields a return in excess of the amount necessary to reimburse the municipality for the cost of supervision and inspection."

From this last quoted case on pages 425-6, I beg to make the following quotation from the opinion of Chief Justice Fuller:

"In *Chester City v. Western U. Teleg. Co.*, 154 Pa. 464, 25 Atl. 1734, in which it was averred in the affidavit of defense that the rates charged were at least five times the amount of the expense involved in the supervision exercised by the municipality, the Supreme Court said: 'For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is it does not go far enough. It refers only to the

usual ordinary or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of duty, an action might lie against the city for the consequence of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit."

In *Taylor v. Postal Teleg. Cable Company*, 20 Pa. 583, 52 Atl. 128, the Supreme Court said:

"Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. * * *

Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts, and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise, and the expense of the same." And see *Philadelphia v. Western Union Teleg. Co.*, 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454."

"Concurring in these views in general, we think it would be going much too far for us to decide that the test set up by the plaintiff in error must be necessarily applied, and the ordinance held void because of failure to meet it. As the Supreme Court pointed out, the elements entering into the charge are various, and the Court of Common Pleas, the Superior Court and the Supreme Court of Pennsylvania have held it to be reasonable, and we cannot say that their conclusion is so manifestly wrong as to justify our interposition.

This license fee was not a tax on the property of the Company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was

a charge in the enforcement of local government supervision and as such, not in itself obnoxious to the clause of the constitution relied on. *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92, (37 L. Ed. 380), 13 Sup. Ct. Rep., 485, 149 U. S. 465, (37 L. Ed. 810) 13 Sup. Ct. Rep. 990."

In the case of *A. & P. Tel. Co. v. Philadelphia*, 190 U. S. 160, the court, evidently fatigued by the persistent presentation of the conflicting interests between parties interested in interstate commerce and those responsible for the internal regulation of local concerns, undertakes to lay down five specific propositions as governing the relation between these conflicting interest and in support of each of these propositions cites numerous cases decided by that tribunal.

These propositions are as follows:

"FIRST.—As said by Mr. Justice Bradley, speaking for the court in *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 492, 30 L. Ed. 694, 696, 1 Inters. Com. Rep. 45, 46, 7 Sup. Ct. Rep. 592, 593:

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation."

"SECOND.—No State can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce."

"THIRD.—This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce."

"FOURTH.—The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to State taxation, providing, at least, the franchise is not derived from the United States."

"FIFTH.—No corporation, even though engaged in interstate commerce, can appropriate to its own use property public or private, without liability to charge therefor." (190 U. S. 162.)

In this discussion but two of these propositions are in any wise involved, namely, the second and fifth. The two, apparently in conflict, must be reconciled. That the court then proceeds to do in the following language:

"The tax sought to be collected in this case was not a tax upon the property or franchises of the company, nor in the nature of rental for occupying certain portions of the street. Neither was it a charge for the privilege of engaging in the business of interstate commerce, but *it was one for the enforcement of local governmental supervision such as was presented in Western Union Telegraph Co. v. New Hope*, 187 U. S. 419.

"Prima facie—it was reasonable. *Western Union Tel. Co. v. New Hope*, 187 U. S. 419, ante, 240, 23 Sup. Ct. Rep. 204. It devolved upon the company to show that it was not. The case as we have seen, was tried before the court and a jury. Upon the testimony the court instructed the jury to find for the plaintiff the full amount claimed." (190 U. S. 164.)

The decision below was reversed it is true, but solely on the ground that the court had erred in withdrawing the question of the reasonableness of the charge from the jury. The opinion concluded in the following language:

"We do not say that a city has not, by virtue of its police powers, authority directly to compel the removal of wires from poles to conduits, but it may be questionable whether a city can seek the same results by an excessive and unreasonable charge upon overhead wires. We think, therefore, the court erred in withdrawing the case from the jury."

In the case under consideration the question of the reasonableness of the charge is with the court, this being a proceeding in equity; and under the evidence in this case it is confidently submitted that the court cannot say that the charge of \$2.00 per pole is excessive. On this particular point, viz., the reasonableness of

the charge, two other more recent cases in the Supreme Court are interesting and instructive.

In *Postal Telegraph Cable Co. v. New Hope*, 192 U. S. 55, which also reverses a judgment of the Supreme Court of Pennsylvania (202 Pa. St. 552), it appears that the Borough of New Hope instituted an action at law in a State court to recover of the company \$552.00 with interest, alleged to be due the borough on account of license fee tax of one dollar for each pole and two dollars and fifty cents for each mile of wire used in the borough by the company. The defense interposed was that the defendant was engaged in interstate commerce and that the charges claimed to be due from the defendant under the ordinance were unreasonable, unjust and excessive, and was wholly disproportionate to the usual ordinary and necessary expenses of inspections and supervising the poles and wires located in the Borough of New Hope. It was claimed that the charges were more than *ten times* in excess of such expense. It was established that the only work done by the borough in connection with the company's property was "to count the poles each year for the purpose of assessing the tax; that no other service on the part of the borough was performed under its police powers, or at all, in regard to inspection." The jury were instructed by the trial court to give a verdict for the full sum, if they thought the ordinance reasonable, and if not, then the verdict should be for the defendant, but as the Supreme Court says: "the jury did not obey that direction" but brought in a verdict for a sum considerably less than due if the ordinance was valid, and as the court says evidently undertook to constitute "itself a taxing body, the verdict being the result of its own views as to what the fees should have been." On this verdict the trial court entered judgment for the plaintiff and this judgment was affirmed by the Supreme Court of Pennsylvania. It is no wonder that the Supreme Court of the United States set aside this verdict for the obvious reason that of necessity both the jury and the trial and appellate courts had held the ordinance fixing the tax unreasonable, and, if unreasonable, void, and, if void, no charge had been legally assessed against the company, and without a charge there could be no judgment for any sum.

It is evident from the whole tenor of the opinion that if the

verdict of the jury had been for the plaintiff for the whole amount followed the case of *Western Union Tel. Co. v. New Hope*, 187 U. the Supreme Court would not have disturbed it and would have S. 419, which holds that although the charge "yields a return in excess of the amount necessary to reimburse the municipality for the cost of supervision and inspection," yet unless it is "so grossly disproportionate to the burden imposed upon the municipality in consequence of the erection and maintenance of poles and wires as to warrant the court in presuming that the ordinance was a revenue measure and not a police regulation, it must be upheld." (*Postal Tel. Co. v. Taylor*, 192 U. S. 64, 69.)

In the last mentioned case, the court says of the evidence in regard to inspection:

"The borough is, where the poles are planted and the wires stretched, sparsely settled, and the danger to be apprehended from neglect in regard to the poles and wires is reduced to a minimum. The borough has in fact done nothing in the way of inspection or supervision during the time covered by the license in question. It has not expended one dollar for any such purpose. It has incurred no liability to pay any expenses arising from inspection or supervision on its behalf. The fee itself is twenty times the amount of expense that might have been reasonable and fairly incurred to make the most careful, thorough and efficient inspection and supervision that might have been made of such poles and wires, and for all reasonable measures and precautions that possibly could be required to be taken by the borough for the safety of its citizens and the public." (192 U. S. 69.)

The case under consideration presents no such condition as that shown in the evidence of that case, yet the court will be asked to do what the court there was asked to do and properly did. Further on in the opinion it is evident that if the license fee had been five times in excess of the amount expended the court would have approved it, but where nothing, or practically nothing is expended the court says:

"To uphold it in such a case as this, is to say that it may be passed for one purpose and used for another; passed as a

police inspection measure and used for the purpose of raising revenue that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet, because it is said to be an inspection measure, the court must take it as such and hold it valid, although resulting in a rate of taxation which, if carried out throughout the country, would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company. It is thus to be declared legal upon a basis and for a reason that does not exist in fact."

* * * * *

"Judging the intention of the borough by its action, it did not intend to expend anything for an inspection of the poles and wires, and did intend to raise revenue under the ordinance. Courts are not to be deceived by mere phraseology in which the ordinance is couched, when the action of the borough, in the light of the facts set forth in the affidavit, shows conclusively that it was not passed to repay the expenses or provide for the liabilities incurred in the way of inspection or for proper supervision." (192 U. S. 72.)

But it is further submitted that the complainant has not, by the evidence, sustained the truth of its allegation that the imposition of the pole tax of \$2.00 is unreasonable and excessive as it was bound to do under the pleadings. Its allegation was denied which throws on it the burden of proof, besides there was a presumption of reasonableness of the ordinance which had to be overturned.

Looking to the evidence it will be seen that James Merrihew, a witness for the complainant and former superintendent of the Western Union Telegraph Company's Southern Division, says that he thinks an inspection of the poles and wires "three times a year would be ample," (Record, p. 159), and that the annual expense should not exceed \$25.00, while an inspection of the man-holes after the poles are removed and the wires placed in conduits in the underground territory "would not exceed \$50.00" (Record, p. 166) thus aggregating \$75.00 per year, while another witness for the complainant company, John C. Barclay says he thinks *ten dollars a year* would be a reasonable sum to pay annually for the inspection

of "the entire line as it now stands" (Record, p. 173.) Strange as it may seem, this witness states without qualification, that after the wires are placed in conduits, *no inspection would be necessary* (Record, p. 179.) The wide difference made by these two witnesses in their estimates shows that the same were barely more than guesses, as was the estimate made by the learned counsel for the complainant, who placed the number of its poles at 185 (Record, p. 159), whereas, according to the statement of the witness, Merrihew, the company has but 70 poles (Record, p. 154.) Over against this statement that no inspection is necessary after the wires are placed in conduits, I beg to place the detailed account given by Hon. Carlton McCarthy of an explosion which had then but recently occurred, caused by the accumulation of gas in a conduit along Main street which threw several man-hole caps high in the air (Record, p. 249.)

To suggest is to satisfy one that the only safe-guard against such occurrences, fraught with so much danger to the public, is frequent inspection. But the court is not shut up to the contradictory and unreliable character of the complainant's evidence, for the evidence of the defendant establishes affirmatively, and conclusively, that the charge of \$2.00 per pole on 70 poles, equal to \$140.00 per annum, is not an unreasonable contribution for the complainant to make towards the maintenance of a department of the city government solely charged with the duty of supervising and inspecting the proper installation and maintenance of electrical appliances in a large and growing city like Richmond. This evidence will be found on pages 208, 209, 210, 211, 212, 214, 216, 243 and 244 of Record. In the application of this evidence the court will take judicial notice of the fact that electricity is a dangerous and destructive force, which can be made available for modern uses only by appliances more or less complicated which must be inspected frequently and carefully. *Thomas v. Commonwealth*, 80 Va. 92, where it was held that the court will take judicial notice that *apple brandy is intoxicating*; *R. U. Pass. Ry. Co. v. Richmond, &c.*, 96 Va. 670; *So. Ry. Co. v. Cooper*, 98 Va. 299; *Standard Oil Co. v. Wakefield*, 102 Va. 824, 829. See also *C. Electric Light Co. v. V. P. Electric Light & Gas Company*, 94 Ala. 372; *Miller v. Oregon*, 208 U. S. 423.

It is claimed in the bills that the license tax charge of \$500.00 assessed by the city on the company and paid by it, should be taken into account, when considering the reasonableness of the charge made by the city to cover the expense of inspection, but such is not the case, for the license charge of \$500.00 is one made on the *intra-State* business of the company, under an ordinance expressly levying such tax, an exact copy of which ordinance was held valid and constitutional in the case of *Postal Telegraph Cable Co. v. Norfolk*, 101 Va. 125, which followed the case of *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, where it was held that telegraph companies, though engaged in interstate commerce, might be required to pay a license tax on their intra-state business.

(2) Where a party has for years acquiesced, as the appellant did in this matter, with a requirement, it is too late to complain of its invalidity.

By reference to the answer of the appellee it will be seen that this defense is interposed. It is there said:

"(7) Respondent denies that the provisions contained in section 10 of said chapter requiring the payment of a fee of \$2.00 for each and every telegraph pole used or maintained by any company erecting such poles on the streets, parks, lanes, or alleys of the city of Richmond is in violation of the provisions of the Constitution of the United States and the amendments thereof or of the aforesaid acts of Congress, or that the same is an unreasonable, unwarranted and illegal burden upon the owner of such poles, but says that the imposition of such fee is constitutional, legal and reasonable, in view of the many expenditures made by the city to grade and improve its streets, parks, lanes and alleys where said poles are erected, so that the same could be more easily erected than could otherwise have been done, and in order to reimburse the city for the expenses necessarily incurred to inspect the poles, wires and works of the complainant company, but, however this may be, the complainant by its long acquiescence in the payment of said fee without protest or objection, namely, from December 10, 1885, to the institution of this suit, in June, 1904, is now estopped from objecting to the said section on any of the grounds mentioned in the said bill of complaint."

And by reference to the complainant's bill, (Record p. 26) it will be seen that it is there alleged that it had paid to the city

"the license tax of \$500.00 imposed for the current year, and also the pole tax of \$2.00 per pole," and by reference to the answer (Record, p. 68) it will be seen that the truth of this charge was admitted. But the aggregate amount so paid on poles nowhere appears.

It is a well recognized principle that estoppel applies as well when the proceedings of a corporation are assailed on the ground of the unconstitutionality of the statute under which they are had, as when attacked upon other grounds, unless such proceedings, or the purpose to be accomplished, is illegal *per se*, or *malum prohibitum*. Want of power in the corporation may be waived, or an estoppel may be created by failure to assert it at the proper time. See Cooley on Const. Lim., Star, p. 181; *Emery v. Bradford*, 29 Cal. 75; *Cochran v. Collins*, 29 Cal. 129; *Lux & L. Stone Co. v. Donaldson*, 162 Ind. 481; *Holloran v. Morman*, 27 Ind. App. 309; *De Puy v. Wabash*, 133 Ind. 336; *Carson v. Lebanon*, 153 Ind. 567; *Darnell v. Keller*, 18 Ind. App. 103; *Bloomington v. Phelps*, 149 Ind. 596; *Gorman v. State*, 157 Ind. 205; Cooley on Taxation, (3rd Edition.)

Of this contention the learned judge, after expressly holding the charge of \$2.00 per pole proper, pertinently adds:

"It may not be improper in this connection to notice, that I find from the record, that complainant uncomplainingly paid this charge for over twenty years preceding the institution of this suit, and it seems to me that such acquiescence should, unless other reasons than those assigned exist, estop it from complaining now, so far at least as such charge is concerned.

My conclusion is that complainant has not been deprived of any of the rights to which it is entitled under the laws and Constitution of the United States, and that no reasonable rules and regulations have been provided by the ordinance complained of, or by any of its sections, for conducting the business of complainant in the city of Richmond." (Record, p. 299.)

The leading case is *Western Union Telegraph Co. v. Mayor of New York*, decided by the United States Circuit Judge, Wallace, in 1889, and reported in 3 L. R. A., 449, which was followed in 1891, by the case of *Am. Rapid Tele. Co. v. Hess*, 125 N. Y. 641 S. C. 13, L. R. A. 454.

In the first of these cases, it is easy to see from the able opinion of the court, that counsel urged for the Western Union Telegraph Co., the same objections that they now urge for the defendant company why its wires should not be placed in conduits. Of the four counsel, as able as any in the land, then appearing for the Western Union Telegraph Co., at least two, perhaps three, are now before this court bringing to their attention the long ago rejected arguments to sustain contentions of the "dead past."

The learned judge, deciding the case, traced with a clear conception and a steady hand, the lines that divide the police power of a State from the power of Congress to protect instrumentalities or commerce, and the use of highways for the transportation of mail.

He said:

"As is said by the court in *Kidd v. Pearson* 128 U. S. 1 (32 Led. 346), 2 Inters. Com. Rep. 232: 'The police power of the State is as broad and plenary as is the taxing power and property within the State is subject to the operation of the former so long as it is within the regulating restrictions of the letter.'

And in a very recent adjudication it has been stated that the property within the State, of a telegraph company, privileged under the law of Congress to maintain and operate its lines over the post roads of the United States, is subject to the exercise of these two powers.

In *Western Union Telegraph Co. v. Attorney-General of Mass.*, 125 U. S. 548 (31 L. Ed. 793), the court says: 'It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State to which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.'

It is not apparent how the regulation proposed impairs in any just sense the privilege granted to the complainant by the law of Congress. The privilege to maintain telegraph wires 'over and along' post roads is not to be construed so literally as to exclude regulation by the State respecting location and mode of construction and maintenance, which the public inter-

ests demand, but it is to be construed so as to give effect to the meaning of Congress, which to grant an easement that would afford telegraph companies all necessary facilities and which, to that extent, should be beyond the reach of hostile legislation by the States.

Thus interpreted the grant is no more invaded when the regulation requires the wires to be placed in conduits under ground than it would be if they were required to be placed in conduits along the surface of the streets; and when this becomes necessary for the comfort and safety of the community such a regulation is as legitimate as one would be prescribing that the poles should be of a uniform or designated height, or should be located at given distances apart, or at designated places along the streets. Regulations of an analogous character upon the property are those by which railroad companies have been compelled to maintain fences and cattle guards: and in the instances where the competency of such regulations has been considered by the Supreme Court, it seems never to have been suggested that they were an unreasonable interference with the post roads of the United States, or the agencies of the Federal Government, or with the power of Congress to regulate commerce. *Mo. Pac. R. Co. v. Humes*, 115 U. S. 512, (29 L. Ed. 463); *Minneapolis and St. L. R. Co. v. Beckwith*, 129 U. S. 26 (32 L. Ed. 585), 9 Sup. Ct. Rep. 207." *Western Union Telegraph Co. v. Mayor of New York*, 3 L. R. A. 449, S. C. 38 Fed. 552.

In *Am. Rapid Tel. Co. v. Hess*, 125 N. Y. 641, S. C. 13 L. R. A. 454, it was claimed that the company having erected its wires and poles for telegraphic purposes under a general statute of the State of New York, allowing such companies to erect their poles and string their wires thereon without any reservation or restriction, and without conferring any power on the city of New York in relation to the use of its streets, could not be compelled under another act of the State, requiring all such companies having poles and wires on the streets of any city of a population greater than five hundred thousand, to be placed under ground.

The court thus states and disposes of the contention:

"The claim of the plaintiff is that these acts operated as a grant to it of a franchise to use the streets for its poles and wires, and that, therefore, an inviolable contract was created which is under the protection of the Federal Constitution, and

hence that neither the State nor the city, under its authority, could cause its poles and wires to be removed from the streets, except upon compensation to it ascertained in the manner prescribed in the Constitution and laws for cases where private property is condemned for public use. We think the act of 1848 so amended in 1853, can in no proper sense be said to have granted any interest to the plaintiff in the streets of the city. There certainly was no formal grant, and the statutes contain no terms or phraseology appropriate to a grant. They at most confer upon the plaintiff an authority or license to enter upon the streets for its purposes, and subject to certain conditions. The people of the State do not own the streets and the only authority the legislature has over them is to deal with them as streets, and to regulate their use as streets for public purposes; and by these acts it, in effect, determined that one of the purposes for which the streets could be used was the erection of poles and stringing of wires for the business of telegraphy and that that was a public use, not inconsistent with the use of the streets for general street purposes. These were general public legislative acts, in the exercise of the police power of the State, and therefore, they were not beyond the reach or touch of future legislation. The legislature did not intend to divest itself and could not divest itself, of its control over the streets for the public welfare, and we must infer from the language used that it did not intend to bind itself by an irrevocable grant. If, therefore, these acts are to be construed as merely conferring a license which has been acted upon by the plaintiff, the legislature could revoke the license or modify it in any way, or at any time, when the public interest might require it.

But in this case it is not necessary to hold that the plaintiff did not, by the acts referred to, obtain some sort of franchise in the streets of the city. We may, for the present purpose, construe these acts as constituting, in some sense, grants of interests in the streets to the companies organized under them, and contracts *sub modo* with such corporations, and yet the contention of the plaintiff must fail. In the exercise of its rights under the assumed grant and contract, this corporation was subject to the regulation and control of the legislature. By giving the franchise, the State did not abdicate its power over the public streets nor in any way curtail its police power to be exercised for the general welfare of the people; nor did the State absolve itself from its primary duty to maintain the streets and highways of the State in a safe and proper con-

dition for public travel and other necessary street and highway purposes. The grant, if any, was made in reference to the streets, and their maintenance and regulation forever as streets. *The State could at all times regulate the size and location of the poles, the height of the wires from the surface of the ground, and their location in the streets; and when the poles and wires became a serious obstruction and nuisance in the streets, from any cause, it could take such action, and make such provisions by law, as were needful to remove the nuisance, and to restore the utility of the streets for public purposes.* The right of the plaintiff to maintain and operate its wires in the streets could certainly be no greater than the right of railways, which by public authority occupy the streets and highways of the State. The State, in the exercise of its police power, and the regulating control which it has over corporations created by its authority may exercise a general supervision over such corporations. It may prescribe the location of the tracks, size and character of the rails, the precautions which shall be taken for the protection of the public and the character and style of highway crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in the control and regulation of the franchises which such corporations have obtained by statutory authority."

I beg to quote further from the lucid opinion:

"After the passage of the acts referred to, and the building of the subways, and the notice to the plaintiff, it had no right longer to maintain its poles and wires above the surface of the streets. They were then there without authority, and thus became a nuisance, and hence the public officials had the right to remove them. It is quite true that the plaintiff could not remove its electrical conductors into the subways without some expense, but the same is true of railroads occupying streets. They cannot change from one style of railroad to another, nor from one place in the street to another, nor make a change of grade without a considerable expense; and yet the mere fact that they are subjected to expense is no answer to the right of the public, in pursuance of law, to require them to comply with the prescribed regulations."

It would be only a "twice-told-tale" to cite other authorities. Mr. Joyce in his recent work on Electric Law, has summed up the holdings and results of the numerous cases. He says:

"From the cases which have arisen under these acts the following general propositions of law may be deduced: 1. The legislature of a State may, in the exercise of its police power, require electrical wires to be placed underground. 2. The municipal authorities may, under a proper delegation of power, require electrical wires to be placed underground. 3. Such acts may be made to affect not only companies subsequently organized, but those already maintaining poles and wires upon the streets. 4. Acts of this nature do not deprive companies formed under the Post Roads Act of Congress of any of the rights or privileges conferred upon such companies by that act. 5. Acts of this nature do not conflict with the powers of Congress in reference to post roads. 6. Acts of this nature are not in conflict with the paramount right of the National Government to control and regulate interstate commerce. 7. The removal of poles and wires from the streets by the municipal authorities, in pursuance of an act requiring them to remove them, if not removed by the companies within a certain time, is not a taking of private property without compensation. 8. Nor is such removal a taking of property without due process of law, and in violation of the Fourteenth Amendment to the Federal Constitution. 9. The electrical companies may be required to pay the salaries of subway commissioners, and this is not a taking of property without due process of law, and in violation of the Fourteenth Amendment. 10. Acts classifying the cities, as in the New York Subways Act, are not local or private laws, although they may be applicable to only one city. 11. Acts of this nature are a proper exercise of the police power."

That the views stated by the highest court of the State of New York and by the learned writer (Joyce), are in harmony with the decisions of this court. Only a few of the many cases bearing thereon need be cited.

In *New York v. Squires*, 145 U. S. 175, 190, it was said by Mr. Justice Lamar:

"They simply said to it, '*Submit your plans and specifications of your electrical system to the board of subway commissioners, who will determine whether they are in accordance with the terms of the ordinances giving you the right to enter and dig up the streets of the city. This the statutes had a right to do.*' It would be an anomaly in municipal administration, if

every corporation that desired to dig up the streets of a city and make underground connections for sewer, gas, water, steam, electricity or other purposes, should be allowed to proceed upon its own theory of what were proper plans for it to adopt, and proper excavations to make. The evils that would follow such a system of practice would be of great gravity to the public, and would entail endless disputes and bickerings with prior parties having equal rights."

Referring to the quotation hereinbefore made from complainant's bill as to the origin of its *vested* right, I have to say that precedents are not wanting to show that corporations of the character of the complainant are not slow to claim privileges in the streets not justified by law.

In the case of *Western Union Tel. Co. v. Penn. R. R., Co.*, 195 U. S. 540, 557, the court places telegraph companies in regard to their right to occupy public or quasi-public property, on the same footing with such rights as to private property.

It was urged by the telegraph company that to require *consent* in order to obtain the right to erect their lines on railroad property, would deprive them of their rights under the act of Congress; but the court, through Mr. Justice McKenna, says:

"We cannot but feel, therefore, that there is something inadequate in the argument which is based on the apprehension that the act of July 24, 1866, construed as we construe it, gives a *sinister* power to railroad companies. It gives no power to those companies but that which appertains to the ownership of their property."

Without for a moment conceding that the police power of the State or of a municipality, where that power had been delegated to it, as is here the case, is not greater than any other power resident anywhere, and that it will be so recognized by the courts, I submit that a municipality cannot, if it would, divest itself of its power to protect the lives and property of its inhabitants. Any attempt to do so would be *ultra vires*.

In *C. B. & Q. Rwy. Co. v. Nebraska*, 170 U. S. 57, 72, this Honorable Court said:

"The presumption is that when such contracts are entered into, it is with the knowledge that parties cannot, by mak-

ing agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature"—a principle which has been fully recognized in the case of *New York v. Bristol*, 151 U. S. 556. There the court said: "The governmental power of self-protection cannot be contracted away."

In *Detroit Rwy. Co. v. Detroit*, 171 U. S. 48, 53, after saying that it is the duty of a municipal government to consider the future when granting a franchise, added:

"There were many reasons which urged to this—reasons which flow from the nature of municipal trust—even from the nature of legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and the functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

That conditions in Richmond growing out of the persistent refusal of the appellant to conform to ordinances of the City enacted within the scope of the police power, not only endanger life and property, but have actually led to the loss of life and property, there can be no doubt.

To sustain a charge so serious, I feel constrained to do what would otherwise be unnecessary to do, namely, make liberal quotations from the evidence in the cause.

W. H. Thompson, City Electrician, testified as follows:

"21. Q. Mr. Thompson, do you feel qualified to state, by reason of your study and experience, the desirability of wires being placed underground in cities of the size of Richmond?

A. Yes, sir, I think it is a public necessity for all wires to go underground.

22. Q. Why do you think so?

A. Because the recent sleet storms in the City here within the last twelve months have demonstrated that beyond the shadow of a doubt.

BY MR. POLLARD:—

23. Q. Have you any photographs showing the condition of the poles and wires in the recent sleet storms, to which you have referred, if so, please file them?

A. Yes, sir. I now hand you a photograph showing the Western Union's wires in front of Murphy's Hotel, at Eighth and Broad covered with sleet from a sleet storm on Sunday, December 17th, 1905.

Said photograph is filed, marked "Thompson No. 2."

A. (Continued) I file herewith a similar photograph showing destruction of overhead wires by the same sleet storm.

Said photograph is here filed, marked "Thompson No. 3."

A. (Continued) Also a photograph showing the actual falling of poles and wires together, making it a menace to both people and property.

Said photograph is here filed as "Thompson No. 4."

24. Q. Under what conditions, if any, does the presence of overhead wires in the streets constitute a menace to life and property?

A. By their becoming afoul of other wires and impeding the progress of firemen while in the discharge of their duty fighting fires, such as is shown by the following photograph of a fire we encountered in the Chesapeake & Ohio building, Eighth and Main streets, which made it almost impossible to raise a ladder at the fire: which photograph I file with the Notary. (See Exhibit "Thompson No. 5.")

A. (Continued) I also file this photograph, showing a view of the fire known as the Meyers' fire, Foushee and Broad streets, where the falling wires of the telephone and the Western Union Telegraph Company's wires caused the stoppage of traffic for hours and hours, the wires coming in contact with trolley wires.

Photograph filed and marked "Thompson No. 6."

25. Q. What were the dates of the two fires last referred to?

A. I don't think I can tell you exactly; it is on file, in my evidence in the Postal Telegraph Company's Cable case.

26. Q. Speaking of the fire occurring at the Chesapeake & Ohio building, or offices, at the corner of Eighth and Main streets, has there been at that locality, since that fire, any other conflagration, or threatened conflagration, caused by the crossing of wires?

A. Yes, sir, within the last sixty days when they had an accident down there on the railroad, which broke some of

the wires down and some of the poles down, causing the electric light and telegraph wires to become afoul of each other, thereby burning out the instruments in a branch office of the Western Union known as the Chesapeake & Ohio office at Eighth and Main.

27. Q. Did you personally make an inspection of the situation at the time referred to? If so, under what circumstances.

A. Yes, sir. The foreman of the Chesapeake & Ohio branch of the Western Union Telegraph Company called me up by telephone at my residence, and asked me to hurry down there and compel the electric light company to do something to avoid further damage in his office, stating that his whole office was on fire and the instruments were all burned up right and left. I hurried to the scene and gave the proper instructions to the electric light people, who were doing at the time all they could to remedy the trouble, and stayed on the ground until the foreman, Mr. Talley, told me everything was clear.

28. Q. What was the name of the superintendent of the Western Union Telegraph Company's branch office, to whom you have just referred as having telephoned you?

A. He is an officer of the Western Union Telegraph Company directly; he is known as Superintendent of Line Construction of the Chesapeake & Ohio, which is, in fact, a branch of the Western Union System.

29. Q. I asked for his name.

A. I can't give you his initials, sir; his name is Mr. Talley.

30. Q. State whether or not there have been recent occurrences in this city showing that the presence of the Western Union Telegraph Company's overhead wires in the underground district have not only endangered life, but caused death?

A. We have had a good many minor cases. The most serious was that of the killing of one of our brave firemen some little while back, by coming in contact with one of the Western Union wires, in the discharge of his duty, the said wire being in contact with a high potential wire nearby the scene. I have some photographs I wish to file concerning that accident. I now hand you this photograph.

Said photograph is filed and marked "Thompson No. 7."

A. (Continued). The photograph shows a trusted linesman employed by the city, pointing to the contact between the Western Union Telegraph Company's wire and a high potential wire belonging to the Passenger & Power Company,

both wires being supposed to be insulated. The exact locality was at Eighth and Broad streets. The contact was such that it carried the high potential current from the Passenger and Power Company's wire at this point, over the wire of the Western Union Telegraph Company, to the point at which the fireman lost his life.

31. Q. State where that point was.

A. A building on the north side of Broad street between Sixth and Seventh, known as the Evening Journal Building. This photograph I filed ("Thompson No. 8") shows the same linesman holding the two Western Union wires on top of the roof of the Journal building—the wire had burnt in two from an overcharge of current from the Passenger & Power Company's wire, the Western Union wire being partly grounded at this point.

A. (Continued). This photograph I file, showing a burn on the fireman's hand, caused by contact with the Western Union wire.

Said photograph filed and marked "Thompson No. 9."

32. Q. Please state what was the name of the fireman who lost his life by the accident to which you have just referred?

A. Mr. Eugene Wright, fireman of Engine Company No. 3, Richmond Fire Department.

33. Q. How do you know that it was a Western Union Telegraph Company wire that came in contact with the high potential wire of the Richmond Traction Company and caused the death of this fireman?

A. Because, sir, the death of this man led me to investigate the cause of his death, and in tracing the wire from the Journal Building back towards the office of the Western Union, I soon discovered the point of contact.

34. Q. Is it or not your business to keep the run of the ownership of the wires on the streets of the City of Richmond?

A. Yes, sir, I am the supervisor of everything owned and controlled by the City of Richmond, electrical.

35. Q. Could the accident to which you referred have happened if that wire of the Western Union Telegraph Company had been underground, as required by the ordinance?

A. No, sir, if the wire had been underground, the accident would not have occurred, in my opinion.

36. Q. You say in your opinion; is it not clear that it could not have happened?

A. No, sir, it could not have happened.

37. Q. Why?

A. Because the wire would have been safely out of the way by putting it in a conduit under the street; it would not have been subject to interference from storms, sleets, high winds, etc.

38. Q. State whether or not the presence of these wires, as they are located in Richmond, not only seriously impedes the operation of the Fire Department, but, in some instances, the escape of inmates of houses?

A. Yes, sir, in certain localities of the city the wires are so thick you can hardly fire a bullet through without hitting one of them. In case of fires in these houses, it would be almost impossible to raise ladders to rescue people suffering from smoke or fire.

39. Q. Have you any photographs showing such condition, if so, file them?

A. I file this photograph showing the conditions at Murphy's Hotel—telegraph wire, etc., surrounding it, which would seriously impede the operation of the fire department.

Said photograph is filed and marked "Thompson No. 10."

A. (Continued). I file this photograph (marked "Thompson No. 11") showing the wires in the alley in the rear of Everett Wadley's store on Main street, telegraph wires seriously interfering with the functions of the fire-escapes, making it impossible to lower that fire-escape in case of emergency.

A. (Continued). I file this photograph (marked "Thompson No. 12") showing the condition of the wires on Broad street between Sixth and Seventh, in what is known as the dry goods district—large stores, etc.

39. Q. On the photograph last filed by you, I find six cross-arms; to whom do this particular pole and those cross-arms belong?

A. The pole, cross-arms, wires and fixtures all belong to the Western Union Telegraph Company, and are located on Broad street between Sixth and Seventh.

40. Q. State whether or not that is one of the most public thoroughfares in the City of Richmond, where great crowds of people are constantly passing and re-passing?

A. Yes, sir, that is one of the most dangerous points where we look for accidents from falling wires.

41. Q. Is it not about the center of the retail district of the City of Richmond?

A. Yes, sir.

42. Q. File any other photograph you have, showing the condition of the wires.

A. I file this photograph showing the condition of the wires at Cary and Thirteenth streets.

Said photograph is filed and marked "Thompson No. 13."

A. (Continued). I file this photograph (marked "Thompson No. 14") showing, within a block of the scene of the last photograph, where the falling of an innocent low potential wire caused the wholesale death of two horses, by its coming in contact with a trolley wire.

MR. TAGGART:—Same objection and exception.

A. (Continued). I file this photograph (marked "Thompson No. 15"), of south Thirteenth street between Main and Cary, showing the huge telegraph poles owned by the Western Union Telegraph Company, and owing to the narrow sidewalk they occupy almost one-third of the sidewalk.

HON. CARLTON McCARTHY (Record 208-214) testifies on this point as follows:

9. Q. Will you state what you consider the grounds for your opinion that electrical wires should be placed underground in the underground territory?

A. Well, the positive requirement of the ordinances of the city is the first ground for objection to overhead wiring; of course I have learned by reading and by observation and by the testimony of the ablest experts of the United States that overhead wires are both objectionable and dangerous. The practical objection is the fact that numerous wires, even though they are harmless with reference to any current they may carry, are a serious obstruction to the operation of the Fire Department, they obstruct the operation of the firemen in raising ladder; and approaching fires on the fronts or rears of buildings, and when they extend over the roofs of houses, they increase the hazard of the fireman who is attacking fires, they are apt to throw him and injure him in one way or another, even without the presence of a current. Where they carry a heavy current, as for electric lighting, and for railroad purposes, they are dangerous to life and property, because the current very readily follows the line of any harmless wire that happens to fall across the larger current wire, and the probabilities are that countless fires will originate from contact of otherwise harmless wires with these carrying heavy currents; so that the innocent wires, multiplied in number and in direction, are just as dangerous as live wires, because when they fall across the live wires they become just

as destructive of life and property as the wire with the heavy current on it; and they are probably more apt to create accidents than the charged wire itself, because the people naturally avoid the dangerous wires, whereas they would not hesitate to seize one of them which they supposed to be innocent, but which may be really dangerous because of the contact with the charged wire. Another objection which is not serious is that the large number of wires erected in recent days, necessitating a large number of poles, destroys the view along the street, obliterates practically the fronts of the houses. In some instances the poles are so numerous that they obstruct the use of the sidewalk by the people, and it would seem that they must be limited in number in some way or other; either the poles will have to be limited in number or the usefulness and beauty of the streets must be destroyed. They must disappear in the order of nature, it seems to me. I would like to add, of course, that my ground for objection is the law; outside of that, my opinions about it amount to nothing. Officially, I am obliged to recognize the requirements and the justness of the law, which requires their removal. I am sworn to enforce that law enacted by the City Council.

10. Q. Has the City of Richmond recently been sued in one of the courts for damages growing out of the death of a fireman who received an electric shock from a wire of the Western Union Telegraph Company?

MR. TAGGART:—We object to that as wholly irrelevant, incompetent and immaterial.

A. I have received notice of a suit which mentions several parties to the suit. I was interested in it because the city of Richmond was one of the parties mentioned. I do not remember just who else was included in the notice.

11. Q. I now hand you a paper emanating from the Law and Equity Court of the City of Richmond and certified by its clerk as a true copy, summoning the City of Richmond to appear along with other defendants to answer the action of H. H. Wright, administrator of Eugene Wright, deceased. Is that the paper to which you referred; if so, please file it with your deposition as a part of it.

A. You asked me about a wire; I do not remember that any wire was mentioned in connection with it. (Examine paper). Yes, sir, that is according to my recollection of the paper that was served on me.

Said paper is here filed, marked, exhibit, "McCarthy No. 1." (Record 228-230).

Then follows a copy of the process in the suit referred to and also a copy of the declaration in said suit. See record on pages 230 to 237, inclusive.

The evidence of Mr. Robt. Lecky, one of the members of the Board of Fire Commissioners is of such decided importance that I beg to insert the same here in full.

BY MR. POLLARD:—

1. Q. Will you please state your name, age, residence and occupation?

A. Robert Lecky, Jr., 36 years of age, residence 2600 Grove Avenue, Richmond, Vice-President, Secretary and Treasurer of the Virginia State Insurance Company, and Manager of the Milwaukee Mechanics Insurance Company.

2. Q. What connection have you, if any, with the city government?

A. I am the Clay Ward representative on the Board of Fire Commissioners.

3. Q. How long have you been on the Board of Fire Commissioners?

A. Four years.

4. Q. State whether or not your position as an insurance man has attracted you to investigation and study in regard to fire risks in connection with electrical wires?

A. It has, sir.

5. Q. What opportunities have you had for investigation along those lines?

A. In the City of Richmond, for twenty odd years, I have attended every fire that has occurred, when I have been in the city, and I have attended fires in other cities, and have taken great pains to notice the electrical conditions, along with the water conditions and defects in the construction of buildings.

6. Q. State whether or not in your opinion, based upon your investigation and observation, you think it important that all electrical wires, other than trolley wires, should be placed underground within the underground territory of the City of Richmond?

A. I deem it a public necessity, accentuated by the accidents that have occurred within the last few months.

7. Q. Tell those circumstances?

A. On June 21st, 1906, about midnight, an alarm of fire was sent in and was responded to by the companies covering what we know as the retail dry-goods district, and the office

of the Richmond Journal Newspaper was found to be on fire; and during the fighting of the fire, which was on the roof, one of the members of the Richmond Fire Department, Mr. E. M. Wright, lost his life.

8. Q. Are there other accidents that have come under your observation?

A. Several years ago, at a fire in the Leftwich picture store, on the north side of Main street, between Ninth and Tenth, a falling wire caused the death of a dog and the stunning of a citizen. Both of those accidents were during the fighting of fires and were caused by the falling of low current wires over high current wires.

9. Q. State whether or not that is liable to occur as long as the wire remains overhead?

A. Yes, sir, and it is so regarded in the Fire Insurance business in the classification of towns.

10. Q. Classification made by whom, and under what circumstances?

A. The classification made by the National Board of Fire Underwriters, of which organization I am a member; the actual work is carried out by a board of electrical, hydraulic, and other engineers, who are employed for the purpose of applying their practical knowledge to the various cities of the United States.

11. Q. Do you intend to be understood as saying that in densely populated cities, where wires are overhead, the insurance rates are greater than in cities of a similar density of population with the wires underground?

A. I do, sir.

12. Q. What is the difference in the rates, would you say?

A. The difference in the rates between a city properly safeguarded against the electrical wires in the streets, and one that has gone to the expense of placing them underground with the same fire protection, is generally about ten cents on each hundred dollars of insurance.

13. Q. Are you acquainted with the limits of what is known as the underground territory within the City of Richmond?

A. I am, sir.

14. Q. State whether or not in your opinion, gathered from observation and experience and study, the territory thus prescribed by the city is reasonable as to size?

A. Owing to the increase in the business district of the city since the adoption of the ordinance, the limits are much

less than they should be for the safety of the lives and property of the people.

15. Q. In other words you think that the present territory is not only not unreasonably large, but should be enlarged?

A. The territory should be extended several blocks toward the westward, owing to the erection of high buildings, filled with people, in that territory within the last three years.

16. Q. You testified in the case of the *City of Richmond* against the *Postal Telegraph Cable Company*, lately pending in the Supreme Court of Appeals of Virginia, and it is proposed that the evidence in that case shall be copied into this and considered as given originally in this case. Please state now whether you remember, in a general way, your statements made there, and if you wish to correct or modify any statement made in that evidence?

A. I remember the evidence and believe that it presents the conditions to-day as it did at that time, with the exception that two statements made in that case have been verified by actual happenings since I gave that testimony. One has been referred to in the death of this man Wright, and the demoralization consequent from the death of that man, of the entire membership of the Fire Department; and the second is the experience of the city and its people, resulting from the sleet storm of December 15th, when for many days a large portion of the city was subject to fire without our being able to use the city apparatus for the reporting of fires. Long lengths of wires were thrown in the streets, and nearly all of the members of the Richmond Fire Department were forced to patrol the streets day and night for forty-eight hours, to prevent pedestrians and vehicles from coming in contact with those wires; and also, in the event of an alarm of fire, to prevent the Department apparatus from being delayed, or the members hurt or killed, by coming in contact with those obstructions.

Those wires hung in all parts of the city, except on Main and Cary streets, from first to twentieth. As an evidence of the condition, I would like to file this photograph, showing the condition at the corner of 25th and Franklin streets. This condition was duplicated in what is known as Lee District.

Said photograph is here filed as exhibit Lecky No. 1.

A. (Continued). In the arcing of the wire that caused the fire at the Journal office, we found that the current was put on to the lower tension wire immediately in front of the

largest hotel in the city. Had the fire not been discovered in the Journal office, and an alarm had come from Murphy's Hotel, the firemen who were engaged in fighting the fire, raising ladders, and throwing streams would have got the charge that passed through the body of this man Wright on the roof of the Journal office.

17. Q. Please make any other statement you wish in regard to this matter?

A. I would like to emphasize the heavy demoralization of the members of the Richmond Fire Department from the death of one of their number by coming in contact with an electrical current passing through a wire belonging to the Western Union Telegraph Company. And in support of that demoralization, I wish to say that the reports on the San Francisco fire show that although there were but two firemen killed in that fire, the fact that the Chief of the San Francisco Fire Department was killed by falling wires before the alarm was turned in was a demoralization of that fire department and deprived them of the knoweldge as to the location of valves in the water mains; and it is stated, in the reports on that fire, that demoralization and lack of knowledge were caused by this accident.

The death of the Chief of the Fire Department was largely responsible for what is known as the second fire, which proved to be a disastrous one. The same conditions surrounded the outbreak of the Baltimore fire, at which time a falling wire put the Chief of that department out of commission immediately upon his arrival at the fire grounds. Up to the death of Mr. Wright, the members of the Richmond Fire Department had been told of dangers, but they took it for granted that they might be more fortunate than their neighbors; but the realization of seeing one of their number fall suddenly from the building, never to move, has impressed itself so deeply upon them that I am of the opinion that it will be years before we can expect the members of the Richmond Fire Department to be as fearless in the discharge of their duties in the presence of electrical wires, whether they be high or low current, as they were before the death of Mr. Wright.

A. (Continued). I would like to say, Mr. Pollard, that my statement concerning the presence of the electrical current on the Western Union Telegraph wire running from the front of Murphy's Hotel to the Journal office, is a matter of positive evidence, as I was a witness to the cross, and know

that the current was on the wire, and saw the position of the wires, before the cross was remedied.

18. Q. Were you present during the inquest held over the body of Mr. Wright?

A. I was.

19. Q. I now hand you what purports to be a copy of the verdict of the jury holding the inquest over the body of Wright. Will you state what that paper is, and whether that is your understanding of the result of that inquest?

A. I saw a copy of the wording of this charge in the papers, but further than that I cannot identify the paper, although I will say that if I had been on that jury, I would have voted similar to those gentlemen who have signed it.

20. Q. That paper appears to have been certified by Walter Christian, Clerk of the Hustings Court of the City of Richmond, does it not?

A. Yes, sir, I know his signature.

Said paper is here filed as exhibit "Lecky No. 2."

21. Q. State, if you know, whether the overhead wires of the Western Union Telegraph Company are in near proximity to any of the chief hotels of the city.

A. The overhead wires of the Western Union Telegraph Company pass sufficiently close to the eastern side of the Lexington Hotel, at the corner of 12th and Main streets, to prevent the proper use of the Richmond Fire Department's large aerial trucks. The same condition is true regarding the eastern and northern side of Murphy's Hotel annex, located at the southwest corner of Eighth and Broad Streets. The wires of the Western Union Telegraph Company also pass near the western wall of the general offices of the Chesapeake & Ohio Railroad Company, on the southeast corner of Main and Eighth streets and are in such proximity to the wall as to forbid the use of any apparatus or the introduction of streams into the upper stories of that building; and in this building there are several hundred employees, all of whom would have to be rescued from the Main street front, where there is an obstruction of high current power wires, or from the alley-way in the rear, which is on such a grade as to prevent the use of trucks from that point.

22. Q. State the importance and capacity of the two hotels referred to by you.

A. The Lexington Hotel is five stories in height, on the 12th street side, and has an advertised capacity of two hundred people. Murphy's Hotel, which in addition to the build-

ing referred to, consists of the old Murphy's Hotel on the opposite side of the street, has an advertised capacity of seven hundred.

23. Q. State whether or not you consider the location of the wires of the Western Union Telegraph Company, adjacent to the three buildings mentioned, a menace to life and property.

A. I positively consider them a barrier to the proper execution of the work of the Fire Department, and also state my opinion, that, had the fire in the general office of the Chesapeake and Ohio, which originated from the Western Union Telegraph wires, occurred in the day time, with the rapidity with which it burnt, we would perhaps have suffered the loss of life of some of its occupants, due entirely to the presence of wires around the buildings preventing the use of our life saving trucks. (Record 251-258).

GEORGE C. SHAW, Chief of the Fire Department of the City of Richmond, testified as follows:

BY MR. POLLARD:—

1. Q. Give your name, age and residence.

A. George C. Shaw, 49, 315 North 20th street, Richmond, Va.

2. Q. What official position, if any, do you hold in connection with the Richmond City government?

A. Chief of the Fire Department.

3. Q. How long have you been Chief of the Fire Department?

A. About a year.

4. Q. How long have you been connected with the Fire Department of the City of Richmond, and what other position, if any, have you held in connection with it?

A. I am in my 25th year now; I was Assistant-Chief about fourteen years, the remainder of the time I was station man, tiller-man of the truck; It has been about twenty-five years all told.

5. Q. State whether or not your experience in the matter of interference of electrical wires at time of conflagrations will justify you in speaking as to the necessity of placing electrical wires underground within the underground territory of the City of Richmond?

A. They are very dangerous overhead, and they are a handicap at times; they make the men timid, prevent them

from raising ladders, and when that timidness overcomes the men, it goes from one to another, and they don't take the same precaution, they are backward in going into fires, and I think very naturally, if a man thinks he is going to get killed. It was demonstrated last night; we had a fire, the wires fell and all of them were alive; a portion of the building fell and carried the wires with it, and there was such an amount of mortar, dust and smoke and flash of electricity, that I got right in the bunch and threw out both hands and held them and said, "Don't move a peg, you don't know where you are going, if you put your foot on the wires it is certain death to you." A horse in the building at the time was burned so badly that when he got to the front door he fell, and a wire was lying across him; he was shot and put out of his misery. It was the most dangerous fire that I have ever been to. There were two wires lying right in the middle of the street, I had one of the hose-wagons going to the fire, reeling off, and I had to get out of my path and go around and keep the men from them; if they had stepped on them, of course it would have killed them.

A. (Continued.) On one occasion we had a fire, and we had one killed from an electrical wire.

6. Q. How did that happen?

A. He was on top of the building and the wire was arcing; he went up to remedy this trouble, and I think the electric people call it haltering the wire—they put a rope around it to fasten it, pull it away from other wires, and he caught hold of that wire, being engaged in that business before he came to us; he caught hold of this wire or this rope—I was on the ground, he was on the second story; when he went up the ladder I told him to be careful, and he said, 'Yes, sir.' That was the last word he spoke, and he leaned over to remedy this trouble and when he raised up he had the wire in his hand, and he was thrown off the building and he was dead before he hit the ground, he didn't breathe a breath, all from this wire.

7. Q. What was the name of this fireman to whom you refer?

A. His name was Mr. Wright.

8. Q. State whether or not his hand showed that it was burned by electricity?

A. It was burned to a crisp, right there where he had this wire, where the wire struck him. I got to him as quick as I could and carried him in a gentleman's store, but there was not a spark of life in him, not a spark.

9. Q. What locality was this?

A. That was on the north side of Broad street.

10. Q. Between what streets?

A. Between 6th and 7th.

11. Q. What was the character of the wire, was it a low tension wire, or a high tension wire?

A. That I cannot answer; our electrician can tell you, he being better familiar with those things, he examined it after everything was over, he took it up where we left off.

12. Q. From your experience as a fire-fighter, state whether or not, in your judgment, the presence of electrical wires overhead at times of conflagration seriously impedes the extinguishment of fires?

A. Yes, sir.

13. Q. Now, state your reason for so believing?

A. It has been demonstrated by the action of the men.

14 Q. What do you mean by the action of the men?

A. Just as I stated before, they show timidity about going forward, they don't know what minute they will be killed, and when you see a wire dangling down and know it is alive, you know it is certain death if you touch it. The current will follow the stream of water if you hit it with a stream of water. On another occasion we had a wire, it was on Main street, it fell and killed a dog just below the fire.

15 Q. You have stated that at times the current, I suppose you mean the current of electricity, would follow the stream of water. Do you or not mean that the electricity on the charged wire, coming in contact with the current of water, will follow the current to the hose and down the hose to the hand of the fireman who is holding it to deliver it at the fire?

A. Yes, sir.

16. Q. Have you known that actually to happen in your experience?

A. Yes, sir. That has been demonstrated in our department, but not while I was at the fire, you understand, but I have read accounts of it in our Fire Journals, that this electricity would follow the water down to the metal pipe. I can give you the name of the man who had hold of the pipe here, to tell you all about this current following that stream down, but I was not at the fire at the time, that was before I was made chief.

17. Q. What is the name of the man to whom you refer?

A. Redwood.

18. Q. Give his full name, if you please?

A. John H. Redwood.

19. Q. Will you please have him produced?

A. I don't know that I can get him now, he is one of our call men, he is not in our station force, I can put my hand on each one of our station force.

20. Q. You have alluded to the inconvenience occasioned by the presence of overhead wires when it became necessary to raise ladders in fighting fires. Do you know specific instances in which this has caused delay and difficulty?

A. Well, I can't just recall the fire, but quite often I would have to take the ladder and lay it parallel with the pavement and raise it from the pavement: it would interfere so I couldn't raise it outside.

21. Q. Would that necessarily delay fighting the fire?

A. That delays getting the ladder in proper condition.

22. Q. You spoke of a fire occurring last night; what was the location of that?

A. 17th and Cary, the building was formerly used as a machine shop, converted into a wood and coal establishment, conducted by a man by the name of Blacker.

23. Q. What was the character of the wires there which were brought to the ground by the falling walls?

A. That I can't tell you. The superintendent could tell you, he had his men down there trying to relieve me of the trouble, he had to get these wires out of my way.

24. Q. Who cut the wires?

A. The electrical people, Mr. Thompson's force, we had that force with us.

25. Q. What was the name of the man?

A. Gullet and Randolph; it was others there with them, you understand.

26. Q. Did you and your force on last evening find yourselves embarrassed and impeded by the presence of the wires referred to?

A. Very much so, sir; so much so that I considered it was endangering the men's lives to ask them to go where I wanted them to go.

27. Q. State whether or not you found difficulty in inducing them to go in the face of the dangers you refer to?

A. The words, 'Watch out for the wires' went around from one mouth to another as fast as it could, and that produced that timidity among them." (Record 264-270).

To the same effect is the evidence of John H. Frischkorn, President of the Board of Fire Commissioners, and John H. Redwood, Captain of Fire Company No. 1, whose evidence will be found on pages 271 to 281 of record, to which the attention of the court is specially drawn.

In the face of this array of bold facts, detailed by men of the highest intelligence and integrity can it be said, with any show of reason, that the city of Richmond, in the enactment of sections 27 and 28 was not seeking to protect life and property against a real and imminent danger?

The situation in the city of Richmond by reason of the existence of overhead wires upon its most used and congested streets, could hardly be more vividly presented, nor could the necessity for relief be more convincingly set forth than is done in the foregoing evidence, and yet, with stolid indifference, the appellant now standing alone (as the record shows that practically all other corporations, formerly maintaining wires in the densely populated portions of the city, have put their wires underground, (Record 281, 226, 227), insists that it has some "vested right," or some "contractual obligations" which cannot be impaired, though the safety of property and even life is endangered.

How the court will consider such a defence when the question of the police power is involved was considered in the cases of *Holden v. Hardy*, 169 U. S. 366, and *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 615, 616.

So far from there being any contract, the obligations of which are violated by the city of Richmond, the appellant, by its litigation, is seeking to violate a contract which it has made with the city of Richmond under the ordinance by which it obtained the right to occupy the streets of the city of Richmond.

In *Toledo v. Western Union Telegraph Company*, 46 C. C. A. 111, it was determined that a telegraph company which has accepted the provisions of the act of 1866 is not entitled to erect and maintain its lines over the streets of the city without complying with the reasonable regulations of the city for the erection and maintenance of such lines and without procuring a permit therefor.

To the same effect is the case of *Chicago v. Union Traction Company*, 199 Ill. 259, 270; where it is said:

"The city, as the representative of the State, is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preservation of the health, safety and comfort of the people. The exercise of this power affects the public and becomes a duty, the performance whereof is obligatory on the city. The city could not, by the terms and conditions of the former ordinance, deprive itself of this power or relieve itself of this duty, nor could the defendant in error company, by any contractual terms of an ordinance, exempt itself from the proper and reasonable control of the municipal authorities in matters affecting the health, safety or comfort of the people. "No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power, for it is capable of alienation. It cannot be doubted that a company which secures the right to use the streets of a municipal corporation takes it subject to the police power resident in the State as an inalienable attribute of sovereignty." Elliott on Roads and Streets, p. 801."

In *Saddle River v. Garfield Water Works*, 32 Atl. 978, it was held that a preliminary injunction to restrain a water company from laying its pipes beneath the streets of a town without obtaining its consent cannot be granted on a bill, answer and affidavit which shows that the plaintiff town is endeavoring to require the defendant to compensate it for the privilege, there being in the State statute no authority for the township requiring compensation for the use of its streets the court saying:

"The case as presented makes it at least doubtful whether complainants can succeed in final decree, and the complainants have not made on their part a case sufficiently free from difficulty or doubt on this point to order a preliminary injunction."

It only remains to be said that the charge in the bill made that the construction of conduits will subject the complainant to a greater expense cannot be maintained and is futile in the face of the strong evidence introduced before the court in this cause to show that the presence of over-head wires, especially the wires of the complainant company, are a menace to life and property.

In the very recent case of *Northern P. R. Co. v. Duluth*, 208 U. S. 583, 595-7 the court said:

"There can be no question as to the attitude of this court upon this question, as it as been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligations of contracts."

In *New York, etc. Co. v. Bristol*, 151 U. S. 556, 567, Chief Justice Fuller said:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the State are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. *The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury.* *Boston Beer Co. v. Mass.* 97 U. S. 25, *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, *Barbier v. Connolly*, 113 U. S. 27, *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650; *Mulger v. Kansas*, 123 U. S. 623; *Budd v. New York*, 143 U. S. 517."

This language was approved in *Northern Pac. Ry. Co. v. Duluth*, 208 U. S. 583, 596, 597, where it was pertinently added by Mr. Justice Day:

"The same principles were recognized and the previous cases cited in *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. Rep. 341, and again in *Union Bridge Company v. United States*, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. Rep. 367. The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution."

In *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22, Mr. Justice Shiras said:

"The right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the State and its inhabitants, the police power of the State may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters." Citing *Atchison, T. & S. F. R. Co. v. Mathews*, 174 U. S. 96.

In *Bacon v. Walker*, 204 U. S. 311, 317, the court, speaking through Mr. Justice McKenna, and referring to the case of *Chicago, etc. v. Illinois*, 200 U. S. 561, 592, said:

"In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

And in the case cited by the learned justice, at page 584, it was said:

"We refer also, as having direct application here, to some of the cases familiar to the profession, that recognize the possession by each State of the power, never surrendered to the Government of the Union, of guarding and promoting the public interests by reasonable police regulations that do not violate the Constitution of the State or the Constitution of the United States."

In the recent case of *Engel v. O'Malley*, 219 U. S. 128, 136, Mr. Justice Holmes says:

"The case cited establishes that the State may regulate that business, and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will, as to raise him above State laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination. * * * Whether the court thinks them wise

or not, such laws are within the scope of the discretion which belongs to legislatures, and which it is usual for them to exert. This appeal seems to have been taken upon the notion that the plaintiff had a business which, under the Fourteenth Amendment, the State could not touch. But although cut off from that broad proposition, his counsel presents other more specific objections to the act with earnestness and force."

And in *Noble State Bank v. Haskell*, 219 U. S. 104, 111, Mr. Justice Holmes uses language which strikingly states the general principle involved here. He said:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits. To such an extent do checks replace currency in daily business. If, then, the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it."

And in the most recent case of *Mutual Loan Co. v. Martell*, 222 U. S. ———, ———, Mr. Justice McKenna says:

"There must, indeed, be a certain freedom of contract, and, as there cannot be a precise, verbal expression of the limitations of it, arguments against any particular limitation may have plausible strength, and yet many legal restrictions have been and must be put upon such freedom in adapting human laws to human conduct and necessities. A too precise reasoning should not be exercised, and before this court may interfere there must be a clear case of abuse of power. See *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. Rep. 259, where the right of contract and its limitation by the legislature are fully discussed."

These deliverances from the recent cases are all in harmony with the older cases.

In *R., F. & P. R. R. Co. v. City*, 96 U. S. 521, the contention was that an ordinance of the city, prohibiting the Richmond, Fredericksburg and Potomac Railroad Company from drawing or propelling by steam its cars on Broad street, was void, because the legislative grant to this railroad company had authorized it to build its road within the corporate limits of the city, the location to be approved by the council of the city, and such approval had been given by a resolution adopted, whereby the common council did "approve the proposed location of the said railroad and the present termination of the same, as prescribed in the foregoing resolution," which location was on Broad street, upon which it was afterwards prohibited from going. But the court in answer to the contention of the railroad company used this pertinent language:

"To give to the charter such an interpretation would be to hold not only that the legislature had deliberately violated the chartered rights of the principal and capital city of the Commonwealth, by depriving it of the power to protect the public safety and promote the public welfare, but that the legislature had tied its own hands and placed this corporation above and beyond the reach of law." (*R., F. & P. R. R. Co. v. City of Richmond*, 26 Gratt., 83, 97.)

On an appeal to the Supreme Court of the United States, this judgment was affirmed, Mr. Chief Justice Waite delivering the opinion. This learned judge said:

"The right is granted the company to construct a railroad 'from some point within the corporation of Richmond to be approved by the common council.' No definite point is fixed by the charter. This is left to the discretion of the company, subject only to the approval of the city. The power to approve certainly implies the power to reject one location and accept another, and this necessarily carries with it the further power to reserve such governmental control over the company, in respect to the road when built within the city to the point approved, as may be necessary. This absolute grant of the charter is satisfied if the road is built within the city for any distance, by any route, or to any point. The company, however, desired to pass through Broad street, and for the present, to terminate the road upon the lots purchased for shops and warehouses, and requested the city to approve that loca-

tion. This the city was willing to do upon a condition that it would not be considered as thereby parting with any power or chartered privilege not necessary to the company for constructing its road or connecting it with the depot. These terms were proposed by the company, and accepted. At that time the city was invested with all the powers necessary for the good ordering and government of persons and property within its jurisdiction. By the condition imposed these powers were all reserved, except to the extent of permitting the company to construct its road upon the route designated and connect with the depot. All the usual and ordinary powers of city government over the road when constructed, and over the company in respect to its use, were expressly retained. The company, therefore, occupied Broad street upon the same terms and conditions it would if the charter had located the route of the road within the city, but in terms subjected the company to the government of the city in respect to the use of the road when constructed." (*R. R. Co. v. Richmond*, 96 U. S., 521, 527-'8.)

But apart from the principles on which the above cited authorities rest, it seems paradoxical to say that the act of Congress of July 24, 1866, was intended to have any such effect as that contended for. The act found on pages 4 and 5 of the record is nothing more than "an enabling act," denominated by this court "a permissive statute," *authorizing not compelling*, telegraph companies to use post roads for the construction of the lines, in consideration of which, the companies so far as availing themselves of the right, were to perform certain services for the government at stipulated rates. The act did not in the least limit the freedom of the companies in determining what routes they would establish, or, if established continue to maintain, nor did the act prohibit the companies from contracting with reference to any particular route, that it should be surrendered on failure to perform some obligation in regard to its maintenance.

It must be conceded, I think, that if the act was intended to have any such effect, it would itself be unconstitutional, for that would have been an attempt to confer power upon a corporation to take private property without making just compensation to the owner and would likewise have interfered with the liberty of con-

tract. The case of the *Western Union Telegraph Company v. Williams*, 86 Va. 696, is in point.

But it would seem reasonable, indeed essential, that a suitor alleging the impairment of the obligation of a contract, or alleging the disturbance of some vested right by the enactment of some law, should set forth with reasonable precision the origin, nature and terms of the contract so impaired and the like qualities of the right disturbed, yet there cannot be found in all the elaborate iteration and reiteration of the complainant's grievances any definite statement of what particular contract is impaired by the ordinance.

The answer of the defendant not only denied that there was any contract, the terms of which was impaired by the ordinances in question, but very pointedly brought to the attention of the court the fact that the complainant, as the successor and assignee of the American Union Telegraph Co., had made a contract with the city of Richmond, by its acceptance of the terms of the ordinance of July 16, 1881 (R. p. 59), whereby it had *agreed* that the privileges granted by the ordinance of March 17, 1880, "*shall be revocable at the pleasure of the council*," (R. pp. 58-9), and having accepted and for years enjoyed these privileges, it could not repudiate the condition annexed thereto, and that by its conduct, it was estopped from denying the constitutionality of said ordinance, the privileges of which it had accepted and acted on, for no principle is better settled than that a party who has accepted and acted under a law will not be allowed to assail the law as invalid. *Cooley on Const. Lim.* p. 214; *Dewhurst v. Alleghany*, 95 Pa. St. 437, *Didwell v. Pittsburg*, 85 Pa. St. 412; *Daniels v. Tierney*, 102 U. S. 415, 421; *Purcell v. Conrad*, 84 Va. 557.

FOURTH

The ordinance respecting underground wires, requiring the construction of conduits thirty (30) per cent. in excess of the immediate needs of the company making the construction is reasonable.

The converse of this proposition thus maintained by the appellant in the FOURTH contention made by it is not sustained by the citation of a single authority. By way of argument this *ex cathedra* statement is made:

"It is highly improbable that the telegraph company's business would ever increase to such an extent in the city of Richmond as to require all the space it is thus required to provide under this section of the ordinance, but even were it remotely possible that such a condition should ever exist, it is entirely dependent upon the committee on streets as to whether it would be permitted to avail itself of it."

The latter part of this statement need not be combated for its soundness has already been discussed under the question of the right of the council to delegate to a subordinate person or body the determination of questions of detail concerning the construction of works or appliances located in the streets of the city.

The answer of the city of Richmond clearly points out the position of the city on this question, and the grounds upon which it rests. It is there said:

(d) Nor is the condition in said section 28 made, that all conduits shall be of sufficient capacity to accommodate the wires in such street or alley and also to provide for an increase thereof at least 30 per cent., unreasonable or unjust: that this provision is one generally, if not universally, required of companies placing conduits in the streets of a city, and is intended to prevent the frequent disturbance of public travel upon the streets incident to the digging up of the same for the relaying of additional conduits as the demand for additional wires increases from time to time,

and the fact that such requirement does of necessity impose additional expense upon the company constructing such conduit, is a matter of small concern compared with the great good secured to the public in preventing the interruption of travel consequent upon a constant and repeated digging up of the streets; that the use of the additional space, so required to be constructed, is to be determined upon by the committee on streets, is likewise reasonable and just, otherwise any corporation owning the additional space might, by a refusal to grant permission for its use, necessitate the laying of additional conduits in the street by another person or corporation which might desire to use such space, and thus altogether defeat the beneficial object for which such additional space is required to be constructed. (Record, pp. 140-141.)

If evidence is necessary to sustain this contention it will be found in the evidence introduced on behalf of the city of Richmond:

Hon. Carlton McCarthy, then mayor of the city of Richmond, speaking concerning the injury to the streets of the city of Richmond by the frequent digging therein, testified on behalf of the city of Richmond, as follows:

"My observation and experience have taught me—an observation extending over 25 or 30 years—that there is only one thing that will cure the damage done by the digging of a trench, and that is to secure it by concrete. If it was filled with concrete, or a ridge of concrete of sufficient strength is put over it, the effects of the trench might disappear permanently. But unless that is done, it will appear and reappear; and so far as I know there is no remedy for the disturbed condition; I have never heard of it anywhere or heard of engineers saying there was any cure for the conditions which result from disturbing the original condition of the soil." (R., pp. 247-8.)

The witness was then asked with reference to the requirement now under discussion the following question:

"Q. Do you consider this requirement reasonable or unreasonable?

"A. I think that I have already answered that question in

what I have said. The purpose of the city in making that requirement is to prevent the multiplication of conduit systems. The city being supreme, in a sense, in its own street can conduct the conduit system wherever it chooses to do it; but they prefer by this simple recommendation to use systems which they allow to be constructed in order to prevent the multiplication of conduit systems," etc. (Record, 247-248.)

Speaking of the extent to which electrical companies formerly maintaining their wires upon poles have complied with the requirements of section 28, W. H. Thompson, the city electrician and superintendent of the fire alarm and police telegraph systems, said:

"I am glad to report that great progress has been made both by the electric light and telephone companies, and the city, in placing their wires underground within and *outside of the conduit district.*" * * * Many miles of it have been put down outside of the conduit district."

The witness is then asked in regard to whether said companies have complied with the requirements of section 28 of the ordinance, to which he answered:

"All the companies reserve a space for the city's wires, and a percentage of the space in all conduits is reserved to be allotted by the city, a certain percentage over what is absolutely necessary for the company's service as they put it down is added to it and cannot be used by the companies or anyone else without the consent of the city."

The witness is then more specifically asked as to whether companies so placing their wires underground are complying with the said requirement, to which he answered:

"Yes, sir." (Record, pp. 260-261.)

The conclusion reached by the learned judge of the court below with reference to the provisions of sections 27 and 28, including, of course, this particular requirement as to the 30 per cent. excess, is as follows:

"I think the complainant is shown by the record to be unreasonably apprehensive of the result that will follow the

enforcement of these sections. Their provisions apply to all alike, are not peculiar to the city of Richmond, but are found in the enactments of most of the cities of the United States. At one time not necessary they are now absolutely essential, and not only is the convenience and safety of the public subserved by them, but also do they protect the interests and facilitate the business of the complainant. It is to be regretted that their enforcement will cause trouble and expense to the complainant, as it will also to the defendant, but that is no reason why they should not be respected, nor does that make them unreasonably burdensome. In fact the evidence taken and the case as submitted, discloses no effort on the part of the defendant to discriminate against the complainant, to impose upon it unnecessary restrictions to regulate it by unreasonable provisions, or to cause it to pay excessive charges for its privileges. The city council has acted within the limit of its police power, and the sections now under consideration, instead of being so unreasonable as to demonstrate an abuse of discretion, show rather a disposition to provide for and protect all alike, even if they do place burdens on those who enjoy the privileges they refer to and regulate. The 'underground section' is the populous and congested section of the city, where the poles and wires are an ever continuing danger to life and property, and the defendant, in requiring their removal has acted wisely, and in directing that the wires be placed in conduits, has well and reasonably provided for a difficult problem, one that it was its duty to consider and dispose of." (Record, pp. 296-297.)

It would be presumptuous to attempt to add force to language so clear and convincing as that used by the trial judge.

FIFTH

The ordinance does not seek to put limitations upon the rights of the appellant to use the streets, or to require the abandonment of the use of the streets at the demand of the city, but only requires that so far as any contractual relation with the city shall bind it, such relation shall continue only for a period of fifteen years.

(1) Be it remarked that the provision complained of is far less stringent against the appellant than the provisions in its original ordinance, to which it agreed when it entered upon the exercise of its privileges, and which provided that the privileges then granted "*should be revocable at the pleasure of the Council.*" (Record, 59.)

(2) The provision is in strict accordance with the policy of this State and of other States, limiting the time during which franchise privileges in the streets of a municipality shall continue.

By section 125 of Article VIII of the Constitution of Virginia, it is provided:

"No franchise, lease or right of any kind to use any public property, or any other public property or easement of any description, in any manner not permitted to the general public, shall be granted for a period longer than thirty years."

In this age of rapid industrial and mechanical development and discovery, fifteen years is a long time. New inventions are likely to be made, materially affecting the use and application of electricity, or new discoveries substituting some other force or agency in its place; hence the propriety and wisdom of a provision that would enable the city, once in fifteen years, to review the situation and determine the question of a renewal of the privileges accorded the defendant to maintain conduits in the streets. It is, therefore, submitted that the limitation is reasonable and just, and is a suitable protection against the embarrassment that might result to the city if it had its hands tied by an irrepealable right to the maintenance and use of its conduits in the streets. Suppose

the city wished, at the end of fifteen years, to construct or to allow some street railway company to construct, a subway for railway tracks under the streets where the company's conduits were located. Should such an important improvement be subjected to be blocked, or even embarrassed by a "*vested* right" of a 12x12-inch conduit under the street when it might as well be provided for somewhere else or in some other manner? Surely, the city is exercising a wise foresight, which the court should not pronounce unreasonable.

The ground upon which the complainant claims that this provision of the ordinance is invalid, is that it:

"It seeks to destroy the rights and privileges given by the said act of Congress of July 24, 1866, in that, while said act of Congress gives the unlimited right to your orator to construct, maintain and operate telegraph lines over and along said streets of the city of Richmond, subject only to reasonable police regulations of said city, said section 31 seeks to limit the privilege of building and owning conduits within said streets and the maintenance of electric wires therein to the term of fifteen years, and the said city seeks to reserve to itself, contrary to the terms of the said act of Congress, the right to put such restrictions, conditions and charges as it may see fit upon the privilege of building or owning conduits within said streets, at the end of the said term of fifteen years, and also seeks to reserve to itself the right to order the complete removal from said streets of the conduits constructed by your orator under the terms and conditions of said chapter 88 and thereby to end all rights therein of your orator." (Record, p. 99.)

That the contention thus set forth ever existed, which is denied in the answer of the city of Richmond, is without the slightest foundation in truth as to the intent of the city in the matter, yet, as the record shows, subsequent to the filing of said bill, to-wit, on December 16, 1905, the council of the city of Richmond amended chapter 88, to which section 31 belongs, by adding a section thereto, which is in the words and figures following:

"34. None of the obligations, burdens and restrictions of this chapter shall, in any manner, interfere with or destroy the rights and privileges secured to telegraph companies which have accepted the provisions of the act of Congress of July 24, 1866." (Record, 189-191.)

The intent of the legislative body of the city of Richmond in the enactment of this amendment to chapter 88 is clear when read in connection with the charge in the amended bill (Record, 102), quoted in full on page 57 of the brief of opposing counsel, where it is said, that the appellant had,

"offered to the proper committee of the council of said city and hereby repeats the offer, to place its wires underground within said territory, if said city will waive the illegal and unconstitutional requirements of said chapter 88 hereinbefore set forth."

This conduct of the city in seeking to relieve the fears of the appellant company, denominated by the learned judge of the court below as "unwarranted and chimerical," (Record, p. 296), shows the willingness of the council to meet every reasonable demand of the appellant, as also does the city's long forbearance in seeking to enforce the fines and penalties to which the appellant had subjected itself by reason of its positive refusal to comply with ordinance of the city, while one other company in exactly the same situation as itself and a number of other electrical companies in the same situation except as to any alleged rights which they may have had under the act of Congress, had complied.

It is therefore insisted that the contention of the appellant must fall to the ground, and that by the acceptance of the provisions of chapter 88 by the appellant it would have a franchise right on the streets of the city of Richmond for a period of fifteen years whereas under its present ordinance, as above stated, it enjoys its rights in the city only "at the pleasure of the council of the city of Richmond."

This is also established by the fact that the Postal Cable Telegraph Company, immediately on the enactment of the amendment then a litigant with the city of Richmond, alleging the same grievances as the appellant here immediately consented to the dismissal of its suit. (Record, 224-227.)

In conclusion the attention of the court is called to the impression sought to be made by a quotation from Judge Simonton, sitting

in the Circuit Court of Appeals in the case of *City of Richmond v. Southern Bell Telephone and Telegraph Company*, 96 Fed. 19, before the case had come to this court, where he uses the following language concerning the view that he then had of the intent, scope and force of chapter 88:

"These conditions, regulations, and restrictions, while prescribed by the city council, appear to be stimulated by a desire to suppress and control, perhaps defeat, the existence of the complainant and so was not a lawful exercise of the police power."

From the determination of the court in which this deliverance was made, the city of Richmond, as hereinbefore stated, appealed to this honorable court, where the decree of the Circuit Court of Appeals was reversed and remanded to the Circuit Court of the United States (*City of Richmond v. So. Bell Tele. & Teleg. Co.*, 174 U. S. 761.)

Again coming before the trial judge (Goff), the same learned judge, whose decree is now brought under review, the court fully recognized the validity of chapter 88, and required the Southern Bell Telephone and Telegraph Company to comply with its terms and conditions (*So. Bell Tele. & Teleg. Co. v. City of Richmond*, 98 Fed. 671.) From this decision the company appealed to the Circuit Court of Appeals, and the same judge, whose language is above quoted, affirmed the decree of the Circuit Court, saying:

"But the city council did, in fact, express conditions and qualifications in giving its consent. It may safely be assumed that without such qualifications and conditions, consent would not have been given; that they were the reasons and motive cause for the consent. Then if the city council could not have given—had no authority to give—a conditional or qualified consent its attempt was unauthorized, *ultra vires*, and void, and in fact it never had consented in the only way in which complainants maintain it could consent. From this point of view the condition precedent of the act of the General Assembly has not been performed. In order to maintain and operate its line in Richmond the telephone company is without the consent of the council, and must obtain it. We see no error in the judgment of the Circuit Court. Its decree is

affirmed." (*So. Bell Tel. & Teleg. Co. v. City of Richmond*, 103 Fed. 31-38.)

It is unthinkable that such a learned and conscientious judge as the one who delivered this opinion could have sustained the contention of the city of Richmond that the Southern Bell Telephone and Telegraph Company was bound to comply with "conditions, regulations and restrictions" of an ordinance which were "stimulated by a desire to suppress and control, perhaps defeat the existence of the complainant."

Evidently the learned judge, upon the hearing of the case as then presented, and on full consideration of the holding of this honorable court, repudiating as it did the contention of the appellant company, that by reason of its being engaged in interstate commerce it had a right to the streets of the city of Richmond, anything in any ordinance of the city of Richmond, to the contrary notwithstanding.

Mr. Justice Harlan, delivering the opinion of the court, expressly repudiated any such contention and pointed to the cases of *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530, 558, and to *St. Louis v. Western Union Telegraph Company*, 92 U. S. 100, where it was declared that "the act of 1866 was a permissive statute, and it never could have been intended by the Congress of the United States in conferring upon a corporation of one State the authority to enter the territory of any other State, and erect its poles and lines therein, to establish the proposition that such company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support," adding, that it was "a misconception to suppose that the franchise or privileges granted by the act of 1866 carried with it any unrestricted right to appropriate the public property of a State. It is (said the able Justice) like any other franchise to be exercised in subordination to public as to private rights."

In the light of this situation we find the first conception of Judge Simonton, not in accord with the views of this honorable court, and accordingly when the case returned to his court, Judge Simonton, like his honor, Judge Goff, sitting in the Circuit Court, modified, if not completely recalled the holding first made by him.

In the light of the facts appearing in the record, and of the authorities hereinbefore cited, it is respectfully submitted that the decree of the Circuit Court should be affirmed.

Respectfully submitted,

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Solicitor for Appellee.

January 27, 1912.